CASES
ON
LAW OF ASSOCIATION
Pepper and Lewis

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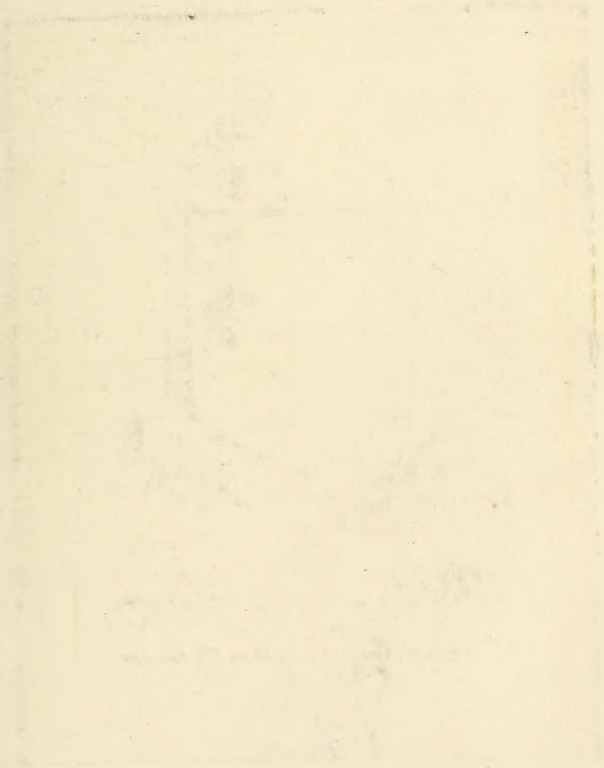

CASES ON LAW OF ASSOCIATION

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CHAPTER I.

THE AGENT'S POWER TO SUBJECT HIS PRINCIPAL TO LIABILITY.

SECTION 1.—LIABILITY ON CONTRACT AND FOR POSITIVE MISFEASANCE.

HERN *v.* NICHOLS.

AT NISI PRIUS, BEFORE HOLT, CHIEF JUSTICE.

1 *Salkeld's Reports*, 289.

In an *action on the case* for a deceit, the plaintiff set forth, that he bought several parcels of silk for —— silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it him for —— silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant who was the merchant, but that it was in his factor beyond sea: And the doubt was, If this deceit could charge the merchant? And Holt, C. J., was of opinion, that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter;* for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger. And upon this opinion the plaintiff had a verdict.

BOULTON *v.* ARLSDEN.

At Nisi Prius, before Holt, Chief Justice, 1697.

3 Salkeld's Report, 234.

In this case it was held, that where a *servant* usually buys for his master upon *tick,* and takes up things in his master's name, but for his own use, that the *master* is liable, but it is not so where the master usually gave him ready money.[1]

WILTSHIRE *v.* SIMS.

At Nisi Prius, before Lord Ellenborough, 1808.

1 Campbell's Reports, 258.

Action for not transferring stock.

The only witness was Watkins, the broker in this transaction, who stated that the defendant gave him orders to sell out £500 of the stock of the trustees of the Commercial Road; that on the 27th of August he agreed to sell it to the plaintiff; that as the transfer could not be made till the expiration of a fortnight, when there was to be a meeting of the trustees, the plaintiff paid him for the stock by a promissory note at fourteen days; that in taking the note he acted with a view to his employer's advantage, thinking the stock might fall before the transfer could be made; that he paid in the note to his bankers, where it was attached for a debt of his own; and that at the end of the fortnight the defendant refused to make the transfer, as he had received no part of the purchase money.

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[1] The other declarations of principles of law are omitted. For another report of the case purporting to give the facts, see 1 Lord Raymond's Reports, 224.

It was contended for the plaintiff, that the sale of the stock on the 27th of August was binding on the defendant. Watkins was his authorized agent, and had acted *bona fide* for his benefit. He must be supposed to have empowered his agent to sell the stock in the manner most for his interest, and the loss ought to fall upon him, not upon the plaintiff, who had paid for the stock, under the natural impression that Watkins had authority to sell it immediately, though a short time was to intervene before the stock could be transferred in the books of the trustees.

Lord ELLENBOROUGH: When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of the stock which he agrees to sell? The broker here sold the stock in an *unusual* manner; and unless he was expressly authorized to do so, his principal is not bound by his acts.

Plaintiff non-suited.

PECK *v.* HARRIOTT.

IN THE SUPREME COURT OF PENNSYLVANIA, 1820.

6 Sergeant and Rawle's Reports, 146.

DUNCAN, J., delivered the opinion of the court.[1]

The plaintiffs in error, being the owners of certain lands in the counties of Erie, Crawford, Warren and Venango, on the 17th October, 1815, constituted one Seth Young, their attorney, in their names to contract for sale, sell and convey, any parts or parcels of the lands, ratifying and confirming all that their said attorney might lawfully do in the premises. On the 29th December, in the same year, Young contracted to sell to the defendants two parcels of the lands. The vendees covenanted to pay the purchase money in four annual instalments, with interest, and make settlements, and certain specified improvements on the land. The first instalment became due on the 29th December, 1816, and in March and April, 1817, the vendees paid Young three hundred and seventy-six dollars fifty cents. By this article the vendors by their attorney, covenanted, on payment of the whole, or a satisfactory part of the money and interest, within the specified time, the improvements being completed, that *they, or their representative, would execute a conveyance,* a good and sufficient warrantee deed in fee, provided, such party should, on giving the said deed, give bond and mortgage on the said premises for the consideration money, or so much thereof as should be due.

This action was brought for the whole consideration money, and the question submitted to the Court below was on the validity of the payments. The Court adjudged they were valid, and on this opinion we are now called on to decide.

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[1] The statement of facts as given by the Reporter is omitted.

Every general grant implies the grant of all things necessary to the enjoyment of the thing granted, without which it could not be enjoyed. Every general power necessarily implies the grant of every matter necessary to its complete execution. An attorney who has power to convey, has so essentially the power to receive the purchase money, that a voluntary conveyance, without receiving the stipulated price or security for it, would be fraudulent, and either the whole contract might be rescinded by the principal, or the vendee liable for the purchase money. The principal authority includes all mediate powers which are necessary to carry it into effect. The payment of the purchase money was an intermediate act between the articles and the conveyance. The receipt of the purchase money is within the general scope of an authority to sell and convey, as a mediate power, as an act without which the conveyance would be fraudulent. No words could confer a more ample authority than is conferred by this instrument. He has power to contract for sale, and having so contracted, to convey. All the acts he performs, necessary in the premises, are ratified and confirmed.

I cannot yield to the argument, that having contracted for sale, his power ended, because the language of the power is very explicit, that he has not only power to enter into executory contracts, but that, having entered into them, he has power to execute them by conveyances, and we must not stop at the words *contract for sale,* and say, that is a distinct power, but must go on with the whole sentence, *sell and convey.* Articles are the first step usual in the sale of lands; the conveyance, the last act which the attorney is authorized to perform. If he had conveyed on the receipt of the whole purchase money, it is admitted that this would have bound the principal. If he had power to receive the whole, he had power to receive any part, and it surely lies not in the mouth of the principal to say, that because he has not conveyed, he has no right to receive the money; for the

same objections would arise had he received the whole money and refused to convey. The validity of the payment does not rest on the actual conveyance, but the power to convey; the payment is to precede the conveyance. There is nothing in the nature of the thing, to justify such a construction, nor in the words of the instrument, and it is a proposition which never can be maintained, that he had only power to receive the money when he had conveyed, and that it is the conveyance which renders the payment valid; whereas, the conveyance could only be good, if the money were paid, if he had power to receive the money, and convey. If he has received the money and not conveyed, the payment must, in all reason and justice, be binding on the principal.

That the attorney here did not exceed his authority in making the contract is admitted by this action calling for its execution. If he did not exceed his authority in making the contract, he had power to carry it into execution by conveyance. In order to enable him to do this, payment of the money, or security, was so necessary an incident, that without it the act would be fraudulent. He had power to convey; to convey without payment, would have been a fraud on the principal; to receive the purchase money, could not be a fraud.

It is not pretended, that the power was revoked; much less, that notice of the revocation before payment, was given. It is not made any part of the case, that there was any fraud on the part of the defendants.

The power of attorney, is unrestrained as to time, credit, or condition. All the authority that the principals could confer, they did. They substituted Young, with all their powers, to part with their title; to convey the estate in fee; to bind *them* with covenants of general warranty. He could sell on credit, having the power to sell on credit; he could receive the money from the vendee, unless there was something in the instrument restrictive of this. It would be

rather an unusual mode of conducting business, to empower an attorney to sell and convey, and restrain him from receiving the purchase money. Here, he is not so restricted, and the implication would be a constrained one; it would be dangerous for the Court to look for a hidden meaning, where the terms are neither obscure, nor equivocal, or to imply a restriction of a power granted in general terms. The power is not required to be executed *uno flatu;* there are several acts to be done, at several times; the last act, the *conveyance,* not to be immeditely executed, not to be executed until all the conditions were complied with by the vendees. The several payments were to come around; and until paid, or a satisfactory part, and mortgage given for the balance, under the general power to contract for sale, and to convey, unrestrained as to the extent of authority, unlimited in its duration, remaining in full force at the time of payment, the Court of Common Pleas decided rightly, in determining these payments to be valid; and the judgment is affirmed.

Judgment affirmed.[2]

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[2]*Compare:* Penfold *v.* Warner, 96 Mich. 179, 1893. (A was the owner of land X. A and his wife B joined in a power of attorney authorizing C to sell any and all real estate belonging to them. A quit claimed X to B. A died. C sold and conveyed X to D. B sold and conveyed X to E. D brought ejectment against E. Judgment in favor of E, affirmed on the ground that such powers of attorney should be strictly construed, and that the power in question only covered B's dower interest in X at the time of the execution of the power.)

Payne *v.* Potter, 9 Iowa, 549, 1859. (B authorized C to sell his, B's, horse. C purported to sell the horse to A, A giving his note therefor. A took possession of the horse, and B brought an action of replevin. At the trial the Court charged the jury "That an authority to sell the horse did not confer upon the agent authority to sell him upon time, and if the defendant in justification shows simply an authority to sell, he must in addition show that the sale was for cash." Judgment for plaintiff. On appeal held, that the charge was correct.)

NORTH RIVER BANK *v.* AYMAR.

In the Supreme Court of New York, 1842.

3 Hill's Reports, 262.

Error to the Superior Court of the city of New York. The action in the court below was by the North River Bank against Aymar and Embury, executors, &c., of Pexcel Fowler, deceased, on eleven promissory notes, six of which purported to have been made on behalf of the defendants' testator, and were signd thus: "Pexcel Fowler—Jacob D. Fowler, att'y." Of these six notes, four were payable to the order of David Rogers & Son, and by them endorsed; and the other two were payable to the order of Jacob D. Fowler, and were endorsed by him, and by D. Rogers & Son. The remaining five notes purported to have been made by Jacob D. Fowler, payable to the order of Pexcel Fowler, and were endorsed in the same form in which the other six notes were signed—viz.: "Pexcel Fowler—Jacob D. Fowler, att'y"—and were also endorsed by D. Rogers & Son. The case, as it further appeared on the trial, was this: The defendants' testator, in his lifetime, executed to Jacob D. Fowler a letter of attorney in these words: "Know all men, &c., that I, Pexcel Fowler, of, &c., have made, &c., Jacob D. Fowler, of, &c., my true and lawful attorney, for me and in my name, place and stead, and to my use, to ask, demand, &c., all such sum and sums of money, debts, &c., which are or shall be due, owing, &c., to me, &c. I do further authorize and empower the said Jacob D. Fowler *to draw all checks or drafts upon any of the banks in the city of New York for all moneys deposited in my name, to endorse any promissory note or notes, bills of exchange or drafts, to accept all bills of exchange or drafts, or in my name to draw any note or notes,* to enter merchandise at the custom house, &c., and to manage and negotiate any business from time to time in

the same manner as if I was personally present. Giving and granting unto my said attorney full power and authority in and about the premises, &c. In witness," &c. About the time this power was executed, Pexcel Fowler and Jacob D. Fowler called together at the banking house of the plaintiffs and left it in their possession, where it had ever since remained. The notes in question were all made during the life of the defendants' testator, and after the execution of the power. Nine of them were not made or endorsed in the business of the defendants' testator, nor for his use or benefit, but for the accommodation of David Rogers & Son, under an agreement between them and the firm of Fowler, Gordon & Co. (of which Jacob D. Fowler was a member) for the mutual exchange of accommodation paper. Fowler, Gordon & Co. failed in business, leaving unpaid a large number of notes made and endorsed under this agreement, on which D. Rogers & Son were liable, and which had been discounted by the plaintiffs. The notes in question were procured by D. Rogers & Son for the purpose of relieving themselves from such liability, and were passed by them to the plaintiffs in exchange for the said notes of Fowler, Gordon & Co. At the time the notes in question were received by the plaintiffs, Samuel D. Rogers, a member of the firm of D. Rogers & Son, and who was also one of the directors of the bank, declared the notes to be business paper, given for goods sold. The defendants admitted that the plaintiffs were entitled to recover on two of the eleven notes; and, in respect to the others, the Court charged the jury that Jacob D. Fowler exceeded his authority—that the power being special, the plaintiffs were affected by the excess, and were not therefore entitled to recover. The plaintiffs excepted. The jury rendered a verdict for the amount of the two notes in favor of the plaintiffs, who, after judgment, sued out a writ of error. Some other facts necessary to a more full understanding of the case will be found stated in the following opinions.

COWEN, J.: As the notes in question were received by the plaintiffs in exchange for the notes of Fowler, Gordon & Co., the former are entitled, so far as their rights are in question on this writ of error, to be considered *bona fide* holders in the fair course of trade and for a valuable consideration.

That the power conferred by the letter of attorney was limited to notes in the proper business of the testator, and that it would have been so independently of the words *to his use*, there can be no doubt. (*Stainer* v. *Tysen*, post, p. 279; *Nichol* v. *Green*, Peck's Rep. 283; *Butcher* v. *Tysen*, U. S. Circ. Court, Nov., 1840, 4 Hunt's Merch. Mag. 456.) To fulfil this purpose of the power, it was essential that the making and endorsing should be upon a consideration passing to Pexcel Fowler, the testator. There is nothing in the nature or effect of such a power which authorizes the attorney to use it for his own benefit or the benefit of any one excepting the principal. And if this limitation be such that an appointee would be bound to notice the fact that the attorney overstepped it, then these plaintiffs were properly cut off by the Court below from their claim upon the contested notes and endorsements.

The general rule, that when an attorney does any act beyond the scope of his power, it is void even as between the appointee and the principal, has always prevailed, and is indeed elementary in the doctrine of powers. The ground on which the rule rests is familiar. The appointee need not deal with the attorney unless he choose; and it is very reasonable that he should be bound to inspect the power, when in writing, or to learn its language in the best way he can, when it is by parol. On becoming acquainted with it, he shall be holden to understand its legal effect, and must see, at his peril, that the attorney does not transgress the prescribed boundary in acting under it. I say in *acting* under it; for it is easy to compare the act with the words to which it must conform; and so far, there is nothing unreasonable—

nothing impossible or even difficult. In speaking of the attorney's acts, I certainly mean to include his declarations made at the time, or in the business which he transacts under the power; for his declarations are a part of the *res gestae,* and bind his principal equally with the act to which they relate. They are always received as evidence against the principal. I authorize a man to borrow a sum of money for me. The power being limited, he has no authority to borrow for himself or his neighbor. He goes to the lender and borrows in my name, showing him my written power, and declaring at the same time that he takes the loan on my account. Both his acts and declarations are evidence against me.

A question often arises upon this and the like cases, how far the appointee is responsible for the agent's fidelity. Take it, in the instance supposed, that his acts and professions make out a case within the terms of his authority; is the man who advances his money accountable for the truth or the good faith of a transaction which, so far as he can see and has reason to believe at the time, is in honest conformity with such authority? Take it that the attorney comes with a falsehood, meaning the loan for his own use, or the use of another whom he desires to accommodate; must the appointee lose his money? He brings his action against the principal, and proves the letter of attorney and the loan as stated; is it necessary to do more? or can the principal turn round upon him and show that his attorney was false to his interest, and so infer that the man who trusted to his letter and made a loan apparently according to its purview, must himself be visited with the consequences of the fraud? I confess that, until I heard the argument in this cause, I had supposed the mere statement of such a case furnished its own answer; and that to allow such a defence, would be pushing the duty of enquiry on the part of the appointee far beyond the principle on which it is founded—indeed, to an extent absolutely impracticable.

The case I have instanced is, in principle, the one now before us. The plaintiffs were apprised that Jacob D. Fowler had power to make and endorse notes in the business of the testator; and notes actually made and endorsed by the attorney, and purporting to have been so made and endorsed in conformity with the power, were presented to and, in effect, discounted by the plaintiffs. This act was equivalent to an express declaration that the notes were made and endorsed in the business of the testator. A man gives a power to sell land, and the attorney executes a deed in the name of the principal. The transaction imports the same thing as a recital or express declaration referring to the power; and the principal is equally estopped to deny that the authority has been pursued.

There are a few general principles entirely settled and universally acted upon, especially in dealing with negotiable paper, which it may be well to remember. One was laid down in *Hern* v. *Nichols* (1 Salk. 289). The defendant's factor being authorized to sell silk, defrauded the vendee; and Holt, Ch. J., held, that the principal was liable for the deceit; "for," said he, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser, than a stranger." (See also *Bowles* v. *Stewart,* 1 Sch. & Lef. 222; *The Monte Allegre,* 9 Wheat. 644.) An application of this principle to men who had authorized an agent to endorse for them was made in *Putnam* v. *Sullivan* (4 Mass. Rep. 45), a case coming very near if not quite up to the one before us. The defendants, who were merchants, having occasion to be absent, left their names with a clerk on blank paper, to be filled up by him and advanced on the sale of goods by the house upon commission, or to renew the notes of the house when due at the banks. On some he was authorized to bind them as makers, and on others as endorsers. A man obtained one of the latter from the clerk by false pretences, wrote and signed a note on the other side, and got money

upon it for his own use on the credit of the endorsement, the lenders having no notice of the fraud. The defendants were held liable. The plaintiffs were informed, too, that it was a blank endorsement which had been left with the clerk, to be used in the business of the defendant. Parsons, Ch. J., said: "Here one of two innocent parties must suffer. The endorsees confided in the signature of the defendants; and they could have no reason to suppose that it had been improperly obtained. On the other hand, the loss has been occasioned by the misplaced confidence of the endorsers in a clerk too young or inexperienced to guard against the arts of the promisor." Looking at the fact that the plaintiffs knew the clerk was limited to use the note in the business of his principals, the power was the same in respect to them, as that of Jacob D. Fowler here in respect to the bank. They found, as the bank did, that the agent had delivered out the note to the promisor, but not that he had exceeded his power, though he had done so in fact. Why not require them to stop and ascertain whether it had been delivered out upon a consideration passing to the defendants? The answer is, that they had put their agent in a condition which enabled him to impose upon strangers by apparently pursuing his authority. They had given him a discretion to speak for them, both by words and actions. The neglect or falsehood of their agent, therefore, was legally imputable to them. The paper being issued without consideration, whether by their agent or themselves, was indeed void as between the original parties; but there being in each case a power to issue paper valid in form, it could not be impeached in the hands of a *bona fide* holder. Everybody knows that a partner who issues a note of the firm for his own benefit, exceeds his power; but the firm cannot avail themselves of the objection as against a *bona fide* holder. Another case is that of *Prescott* v. *Flynn* (reported in Chitty on Bills, 35, note Am. ed. of 1839). In that case it was proved by circumstances that the clerk of the defendants was authorized to endorse for

them in their business. Availing himself of that authority, he endorsed their names on two bills of exchange which he procured to be discounted for his own benefit, and absconded with the money. It was hardly pretended that the plaintiff was bound, though he knew of the limitation, to enquire whether in truth the money was intended for the principals. Indeed, when the case came to be reported in 9 Bing. 19, the reporter thought the fraud to be so entirely immaterial that he did not even mention it. According to both reports, the Court took it for granted that the agent acting for himself, instead of his principals, could make no difference as between them and the plaintiff. It was enough that he had power to act in the defendants' business, and did apparently so act. In *Newland* v. *Oakley* (6 Yerg. 489), an attorney having power to assign notes for his principal, did so; but embezzled the money which he got. That he thus assigned for his own benefit was held not to affect the right of a person to whom one of the notes came in the course of trade.

These cases respecting the limited powers of agents to make endorsements accord with the proposition concerning powers in general as it was submitted to us by the counsel for the plaintiff in error, viz.: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to enquire into facts *aliunde*. The apparent authority is the real authority." Such a rule was substantially laid down by Lord Ellenborough, Ch. J., in *Pickering* v. *Busk* (15 East, 38, 43). He says: "I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, *the reality of which is afterwards to be tried by the fact.* It is clear that he may bind his principal within the limits of the authority with which he has been *apparently* clothed by the principal

in respect to the subject matter; and there would be no safety in mercantile transactions, if he could not." (*Andrews* v. *Kneeland,* 6 Cowen, 354, 357, 358, and the books there cited; *Rossiter* v. *Rossiter,* 8 Wend. 498, 499, and the cases there cited.)

How were the plaintiffs in the case before us to ascertain whether Jacob D. Fowler had acted in good faith towards his principal? On their agent asking one of the payees, Samuel D. Rogers, of the firm of David Rogers & Son, he answers that the notes were business paper, given for goods sold; and this is another circumstance tending to perfect the parallel with *Putnam* v. *Sullivan.*

The only adjudged case cited on the argument for the defendants in error, giving color to the idea that the appointee must look behind the power, is *Atwood* v. *Munnings* (1 Mann. & Ryl. 66; 7 Barn. & Cress. 42, S. C.). The power in that case was extremely limited, being tied up to the acceptance of bills particularly described The words were: "For me, and on my behalf, to pay and accept such bill or bills, &c., as shall be drawn, &c., on me by my *agents or correspondents, as occasion shall require.*" The bill there in question was drawn by Burleigh, a partner of the defendant, for the benefit of the joint concern; and, as the Court held, he was neither a correspondent nor agent within the meaning of the power. There was indeed no need of giving effect to the bill by an acceptance under the power; for Burleigh was authorized to bind the defendant as his partner. The Court held that, as the power described the persons whose names must appear upon the bill, the authority was overstepped if the names were not there. In other words, a power to accept a bill drawn by an agent did not extend to a bill drawn by one who was not an agent. Here the power contains no such limitation. The case cited accords with one of the most familiar rules for the construction of powers; but it does not apply. If the principal will describe the particular condition on which a bill shall

be accepted, however idle, even to the writing of it with a steel pen, it must be fulfilled. There it was to be drawn by a correspondent or agent; and not being so drawn, but by one who was a principal, the condition failed. The appointee was admonished to see at his peril that all the prescribed requisites were combined. The principal would not trust the attorney, even to judge of the parties. There was another clause in the power which, as Bayley, J., inclined to think, also amounted to a condition. The bills were to be drawn *as occasion should require*. It was not necessary to say that the plaintiff was bound on this clause to see the occasion did require; and a majority of the judges who spoke to the question (Holroyd and Littledale, JJ.) did not say so. The two reporters do not entirely agree. In 7 Barn. & Cress., both of the two latter judges are made to discuss the question; in 1 Mann. & Ryl., Littledale, J., is represented as having given a naked assent to what Holroyd, J., said; but in neither does it appear that any but Bayley, J., considered the actual occasion of accepting as a condition. The report of his argument is substantially the same in both, though in Barn. & Cress. he seems to have thought it sufficient to have called for the letter of advice. Littledale, J., in Barn. & Cress., thought the words, *as occasion shall require,* did not vary the question; and that the power should be read without them. This was conceding the ground taken by counsel, that the attorney had a discretionary power to judge of the occasion. I have looked into some authoritative books on agency to find how this case has been considered by learned writers who had studied the subject. It is introduced into the late edition of Paley on Agency (p. 192) by a simple statement of the case, with the opinion of Bayley, J.; or rather, as illustrating the general remark, that all written powers are to receive a strict interpretation, the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect. Judge Story mentions the case several times

in his work on agency (pp. 22, 65 to 67, 69), but evidently considers it as holding no more than that the appointee is bound to see the proper parties introduced. He is evidently of opinion, with Littledale, J., that the words, "as occasion shall require," were no more than what the nature of such a power would imply without them, viz., an authority in the agent to govern himself according to the emergencies of business. The necessity mentioned by Mr. Justice Bayley of calling for the letter of advice was, I think, virtually denied by what Best, Ch. J., and the whole Court afterwards held as to letters of instruction in *Withington* v. *Herring* (5 Bing. 492; 3 Moore & Payne, 30. S. C.). Such letters are often confidential between the parties, and contain matters not fit to be divulged. He said, all that was necessary for the plaintiffs to enquire for, was the authority. The case of *Atwood* v. *Munnings* was mentioned by Park, J., and he, like Judge Story, understood it, not as imposing the duty to enquire into the state of the principal's affairs, but only as to the character of the drawers. Indeed, there is hardly any rule better settled or of more universal application, than that the appointee need not enquire as to matters in their own nature private or confidential between the agent and principal. It may be doubted, says Mr. Justice Story, if upon this subject there is any solid distinction between a special authority to do a particular act, and a general authority to do all acts in a particular business. Each includes the usual and appropriate means to accomplish the end. (Story on Agency, 70.) Is it among those means that the appointee shall lose his money, because the attorney happens to betray the interests of his principal? Would not such a rule rather be a means to make the power utterly unavailable? No prudent man would advance his money under such a responsibility. The rule supposes a degree of capacity to look into the affairs and even the private intentions of others, which no human being possesses.

In the case at bar, the principal was much abroad, and

had left this letter of attorney with the bank for the very purpose of obtaining credit there. It had been repeatedly and for a long time acted upon, the testator having an account at the bank; and the power of Jacob D. Fowler never having been drawn in question. This very case admits the validity of two out of the eleven notes in question. Such circumstances, even without the letter of attorney, should bind the testator's estate. In *Prescott* v. *Flynn*, the defendants' clerk having been introduced as confidential, drawn bills, and on one occasion only been empowered to endorse in their business, they were, from that circumstance alone, held liable on his subsequent endorsement of their names for his own benefit. Here we have a stronger case. Both the testator and Jacob D. Fowler came with the letter of attorney, and deposited it with the plaintiffs; the attorney had drawn and endorsed through a course of five or six years; the testator, a ship master, being frequently at home, and knowing and approving every act nearly up to the time of the making and endorsing now in question.

In *Nichol* v. *Green* (Peck's Rep. 288), the attorney, under a power like the present, dealt directly with the plaintiff, purchasing on his own account, as the plaintiff knew; and then, under the power, made and endorsed the note in question. Haywood and Peck, JJ. held what we have just now decided in *Stainer* v. *Tysen* (Post, p. 279), on the distinction between taking the note with or without knowledge of the fraud. One judge dissented, and one took no part in the cause. It does not appear how it was finally decided. The case of *Butcher* v. *Tysen*, which was before the Circuit Court of the U. S., in November term, 1840 (4 Hunt's Merch. Mag. 456), decides the same point the same way. The plaintiff cannot complain that the defendant clothed his agent with the means of perpetrating a fraud when none has been actually committed. The difference rests entirely upon that fact. In the cases cited, the question in debate was, whether by authorizing the agent to issue notes in the name of the principal, without words expressly restricting

the issue to his own business, he did not confer the power of issuing them for the benefit of everybody, even including the attorney. That the power is to be thus construed, was contended in the case before us, and in *Stainer* v. *Tyson*. We have arrived at the conclusion without much difficulty, that to give the power so great an effect, the principal must go farther, and expressly declare his meaning that the attorney may use his notes for the benefit of others beside the principal.

On the distinction which I have endeavored to establish in favor of a *bona fide* holder, I am of opinion that, in the case at bar, the Court below erred when they charged that the attorney had exceeded his power in that sense which avoided these notes in the hands of the plaintiffs. As against his principal, he did exceed his power; but the executors must look to him, not the plaintiffs, for their indemnity.

The point that the bank had notice through Samuel D. Rogers, the director, does not arise. There was indeed evidence that he had notice and acted as director in respect to nearly if not quite all the notes. If these things finally turn out to be so, of course the plaintiffs cannot recover on those notes in respect to which they were thus affected with notice. (*Bank of the United States* v. *Davis*, 2 Hill, 451.) But the question was entirely excluded, by the charge, from the consideration of the jury; and, for aught we can see, the Court laid no stress upon it. They put the case on the naked independent question of authority; and, under the charge given, the jury were bound to find for the defendants, although they believed the plaintiffs were *bona fide* holders. I have, therefore, as in duty bound, considered them such. No doubt they were so in fact. If not so constructively, owing to one of their agents having had notice, they must fail; but they are none the less entitled to have the question tried and disposed of upon that issue.

Some other minor points were mentioned on the argument by the counsel for the defendants in error; but the

same answer applies. They were not passed upon in the Court below. On the whole, I am of opinion that the judgment should be reversed; a *venire de novo* to go from the Court below, the costs to abide the event.[1]

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[1] Bronson, J., concurred. The dissenting opinion of Nelson, Ch. J., is omitted, the reasoning being the same as that of Chief Justice Shaw in Mussey *v.* Beecher, *infra.*

Compare: New York & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30, 1865. (The directors of the C Co. appointed their president B as a stock transfer agent. As such agent B was authorized to note the transfer of certificates on the books of the company, to issue new certificates on the surrender of old certificates, and when the company sold stock to issue certificates to the purchasers. B, for his own purposes, transferred into his own name, and afterwards sold stock, which had no existence in fact, but for which he issued certificates on their face apparently valid. These spurious certificates were purchased by A, *et al.*, who were ignorant of B's fraud. As between A *et al.*, and the C Co. it was *held* that the spurious stock was not stock of the company, but that the property of the company was liable for the injury to A *et al.*, on the ground stated by Comstock, J., in Griswold *v.* Hernen, 25 N. Y. 601, namely: "That where the authority of an agent depends upon some fact outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of his agent." p. 68).

GRANT *v.* NORWAY.

In the Court of Common Pleas, 1851.

10 *Common Bench Reports*, 665.

This was an action upon the case by the endorsees of a bill of lading, against the owners of a vessel, to recover the amount of advances made by the former upon the bills of lading, the goods never having in fact been shipped.[1]

Jervis, C. J., now delivered the judgment of the Court.

This case was argued before my brothers Cresswell and Williams, and myself. It arises upon a special verdict, and presents a question of considerable importance, both to those who take bills of lading on the faith of their representing property which passes by the transfer of them, and to the ship-owner, whom it is attempted to bind by all bills of lading which his captain may think fit to sign. The point presented by the several pleas is substantially one and the same, viz., whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The authority of the master and necessary for the use and enjoyment of the ship; but is of a ship is very large, and extends to all acts that are usual subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign ports, and, under certain circumstances, at home, for necessary disbursements, and for repairs, and bind the owners for repayment; but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may

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[1] The rest of the Reporter's statement of facts, and his notes of the arguments of counsel are omitted.

pretend that it is. He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods. Constant usage shows that masters have that general authority; and, if a more limited one is given, a party not informed of it is not affected by such limitation. "The master is a *general agent* to perform all things relating to the usual employment of his ship; and the authority of such an agent to perform all things *usual in the line of business in which he is employed,* cannot be limited by any private order or direction not known to the party dealing with him."

Is it then usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? for, all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until goods are on board; for, it begins by describing them as *shipped.* It was not contended that such a course is usual. In *Lickbarrow* v. *Mason,* Buller, J., says: "A bill of lading is an acknowledgment by the captain of having received the goods on board his ship; therefore, it would be a fraud in the captain to sign such a bill of lading, if he had not received the goods on board; and the consignee would be entitled to his action against the captain for the fraud."

It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped: nor can we discover any ground upon which a party taking a bill of lading by endorsement, would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.

If, then, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill

of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. It would resemble the case of goods or money taken up by the master under pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or endorsed *per procuration,* when no such agency existed; *Alexander* v. *Mackenzie,* 6 Com. B. 766 (E. C. L. R., vol. 60). The words *"per procuration"* give notice to all persons that the agent is acting under a special and limited authority; and therefore the party taking such a bill has to establish the existence of the authority; it is not enough to show that other bills similarly accepted or endorsed have been paid, although such evidence, if the acceptance were general, by an agent in the name of the principal, would be evidence of a general authority to accept in the name of the principal. So, here, the general usage gives notice to all people that the authority of the captain to give bills of lading, is limited to such goods as have been put on board; and a party taking a bill of lading, either originally, or by endorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it.

There is little to be found in the books on this subject. It was discussed in *Berkley* v. *Watling,* 7 Ad. & E. 29 (E. C. L. R., vol. 34), 2 N. & P. 178. That case was decided on another point: but Littledale, J., stated, that, in his opinion, a bill of lading is not conclusive upon the ship owner.

For these reasons, we are of opinion that the issues should be entered for the defendants, and that the defendants are entitled to judgment.

Judgment for the defendants.

MUSSEY *v.* BEECHER.

In the Supreme Court of Massachusetts, 1849.

57 Massachusetts Reports, 511.

Shaw, C. J., delivered the opinion of the majority of the Court.[1]

This is an action of assumpsit for goods sold and delivered, which are alleged to have been purchased of the plaintiff by the defendant, through the agency of William Pierce, acting under a power of attorney from the defendant. The question is upon the legal construction of the defendant's power of attorney to Pierce, which is in writing.

"Know all men by these presents, that I, Laban S. Beecher, of Roxbury, in the county of Norfolk (doing business in Boston), leather dealer, do hereby constitute and appoint William Pierce, of Andover, in the county of Essex, bookseller, my sufficient and lawful attorney, for me, in my behalf and as my agent, to purchase books, paper and stationery, for the purpose of carrying on business in said Andover; and the same to sell again, for my benefit and on my account, on such credit and at such prices as he may deem meet; to collect, recover, demand and receive all debts and sums of money due and receivable for and on account of the sales of said goods and merchandise, and generally to do and perform such matters and things as are necessary and proper for the carrying on and conducting of said business.

Provided, however, that said Pierce shall not make purchases or incur debts exceeding in amount at any one time the sum of two thousand dollars, and also that this

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[1] Having inserted in the opinion the power given by the principal to the agent, the statement of facts as given by the Reporter is omitted.

power or agency shall not extend for a period of time more than one year from the date hereof, or beyond the 1st day of January, A. D. 1842. Hereby ratifying and confirming whatsoever my said attorney may do in the premises. In testimony whereof, I have hereunto set my hand and seal this first day of January, in the year eighteen hundred and forty-one.

E. N. BADGER, witness. LABAN S. BEECHER, (seal.)

BOSTON, Jan. 1, 1842.

The power was afterwards extended by a memorandum to the 1st of January, 1843.

The presumption is, that the plaintiff knew of the terms of this power and of its limitation, before he sold goods to Pierce, on the strength of it, and on the credit of the defendant; and indeed, the evidence was, that he had seen the instrument. Various questions of fact were submitted to the jury, on the evidence, as to the extension of the power, or a waiver of the limitation, and the like; but the real question arises upon the correctness of the instructions, in matter of law.

The Court instructed the jury, that the plaintiff must show, that such goods were sold under the power to Pierce, as his agent, and not upon the personal credit of Pierce; and that, although the power was limited, and such limitation was known to the plaintiff, yet that the defendant would be liable for Pierce's purchases, even though he had already exceeded the amount authorized by the power; if they were satisfied, from the evidence, that, at the time of the purchases, Pierce represented, that by such purchases he would not exceed his limit.

In another connection, the same instruction, in effect, was given, with a slight variance of form, as follows: "that if the plaintiff had inquired of Pierce about the agency, and had been informed by him that it was not full, and he had no reason to suspect the truth of Pierce's declaration, and if the plaintiff then sold goods to Pierce, as agent, as

aforesaid, the defendant would be liable for such goods, even though the agency was then full."

The former part of this instruction, that it must appear, that the goods were not sold on the personal credit of Pierce, is unquestionably correct; but, in regard to the latter part, which makes the defendant responsible for the veracity and accuracy of Pierce, a majority of the Court are of opinion, that it was not correct in point of law.

This power of attorney, which is in the nature of a letter of credit, is precise and limited in amount; and, though it contains some expressions, intimating that the attorney is the general agent of the constituent, to purchase and sell goods, yet this is controlled by the proviso and express condition; and, taken all together, as every written instrument must be, it is an authority to purchase in the name and on the credit of the author of the power, to the amount of $2,000, and no more.

The precise point is this, whether, if Pierce, through design or mistake, represented to the plaintiff, that when he made the purchase in question, he had not purchased on the credit of his principal to the amount of $2,000, when, in truth, his purchases exceeded that sum, the defendant was bound by it. It is unquestionably true, that the statements and representations of an agent, in transacting the business of his principal, within the scope of his authority, are as binding on his principal, as any other acts done within the scope of his authority; they are *res gestae,* and are acts. But an agent cannot enlarge his authority any more by his declarations, than by his other acts; and the rule is clear, that the acts of an agent, not within the scope of his authority, do not bind the principal. It is often said, indeed, that one is bound by the acts of a general agent, though done against his instructions. This is because the acts are within the scope of his authority; and the violation of his instructions, in the execution of such authority, is a matter solely between himself and his principal, which cannot affect a stranger dealing with him without express notice.

The argument is, that the defendant ought to be bound, because Pierce was his agent, and he, by his letter of attorney, had put it in his power to make such purchase. This, it appears to us, assumes the very point to be proved. The plaintiff knew that he was limited to $2,000; he knew, therefore, that if he had purchased to that amount, his power, by its own limitation, was at an end. If it were otherwise, a power to purchase to the amount of $2,000, would operate as a power to purchase to an unlimited amount. But it is urged, that, upon this construction, no one could safely deal with the agent. This objection, we think, is answered by the consideration, that no one is bound to deal with the agent; whoever does so is admonished of the extent and limitation of the agent's authority, and must, at his own peril, ascertain the fact, upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent, who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of the goods trusts the agent, and if he is deceived by him, he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and, therefore, the maxim, that where one of two innocent persons must suffer, he who reposed confidence in the wrong-doer must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods. *Parsons* v. *Armor,* 3 Pet. 413; *Stainer* v. *Tysen,* 3 Hill, 279; *Attwood* v. *Munnings,* 7 Barn. & Cr. 278. The case of *Putnam* v. *Sullivan,* 4 Mass. 45, was decided on the ground, that the defendants, by leaving blank indorsements with their clerk, had authorized him by his act to bind them as indorsers.

On the whole, a majority of the Court are of opinion, that the verdict must be set aside, and a new trial granted.

Wilde, J. I have been unable to agree with my learned brethren in the decision of the question raised at the trial of

this cause; although I fully admit the principles on which the question has been decided.

In my judgment, with great deference to the opinion of my brethren, these principles are not applicable to the present case. The question, as it seems to me, turns on a well established principle of law, which I am not aware has ever been disputed.

The principle is this, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. It is so laid down by Ashhurst, J., in *Lickbarrow* v. *Mason,* 2 T. R. 63, 70. "The rule," says the learned judge, "is founded purely on principles of law, and not on the custom of merchants." The same rule of law is laid down by Holt, C. J., in *Hern* v. *Nichols,* 1 Salk. 289, a case very like the present. That was an action on the case for a deceit practiced on the plaintiff, by the defendant's factor, in the sale of several parcels of silk; and it was held by the learned chief justice, that the defendant was answerable for the deceit of his factor, though not *criminaliter,* yet *civiliter;* for seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver, should be a loser, than a stranger." The same principle is laid down by Parsons, C. J., in *Putnam* v. *Sullivan,* 4 Mass. 45, 54, and by Cowen, J., in *North River Bank* v. *Aymar,* 3 Hill, 263.

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I admit that the plaintiff was bound to inquire into the agent's authority, and whether the sales to him, on the credit of the defendant, would not exceed the amount limited in his power of attorney. But of whom was he to inquire? He certainly had no means of knowing; and if he might not rely on the representations of the agent, the consequence would be, that no sale could safely be made on credit under the power. But the power was given to be used for the benefit of the defendant, and if given in such a form as to enable the agent to perpetrate a fraud, by obtaining credit

by false representations, and credit was so obtained, and a loss occurred, it should be sustained by the defendant, and not by the plaintiff, who dealt with the agent in good faith, without knowing, or having any means of knowing, that he was exceeding his authority.

Verdict set aside and new trial granted.[2]

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[2] Compare in accord with opinion of Shaw, C. J., Baines *v.* Ewing, 4 H. & C., 511, 1866. (At Liverpool there is an Underwriters' Association, and when a person desires to become an underwriter he authorizes a broker to underwrite for him. It is well known that in almost all cases, a limit is put on the amount for which the broker can sign his principal's name, but when the principal's name is given to the association that limit is not mentioned. B authorized C, a broker, to underwrite for him "marine risks not exceeding £100 by any one vessel." C underwrote a policy on A's ship, in B's name, for £150. The ship was lost. A sued B on the policy. Plea, that B did not subscribe to the policy. A verdict was obtained for £150, leave being reserved to enter a non-suit, or reduce the verdict to £100 unless, etc. Rule absolute for a non-suit. Martin, B.")

UDELL *v.* ATHERTON.

In the Court of Exchequer, 1862.

7 Hurlstone and Norman's Reports, 171.[1]

Wilde, B. I am of opinion that the rule ought to be absolute to enter the verdict for the plaintiff; and I have the authority of the Lord Chief Baron for saying that he agrees with the judgment.

This was an action of deceit. The cause was tried before my brother Martin, who will state the facts more fully. But the short result of them was, that the plaintiff bought of the defendant's agent a log of mahogany: that he was induced to do so by certain statements of the agent which were false to his own knowledge, dishonest, and fraudulent. He has paid the defendants the price so obtained, which is twice the real value of the log, and he brings his action accordingly.

The question is thus raised, whether a principal, who has had the benefit of a contract made by his agent, is responsible for a deliberate fraud committed by his agent in the making of the contract, by which fraud alone the contract was obtained.

I say "responsible" generally, because I am not aware that if this action of deceit does not lie against the principal any other form of action will. If this be so, the consequences appear to be as follows:

The man who has reaped the benefit of a fraud committed on his behalf keeps the fruits in his pocket; the man defrauded in the contract has to look to the intermediate person, and not him *with whom* he contracted. If the agent is a man of no means this remedy would be fruitless. If

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[1] The facts as given by the Reporter, and the opinion of Bramwell, B., concurring with Martin, B., are omitted.

the agent is able to pay he does so without remedy over, and the person defrauded is reinstated out of the funds of one man, while the fruits of the fraud are retained by another.

These results make it desirable to examine closely the principles upon which such a decision is to be supported.

It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this, as a general proposition, I agree. All deceits and frauds practiced by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal.

On this principle it was that the Court of Common Pleas, in *Grant* v. *Norway,* 10 C. B. 665 (E. C. L. R., vol. 70), held a shipowner not responsible for the fraud of the captain in signing bills of lading without any goods on board; and so, in the case of *Coleman* v. *Riches,* 16 C. B. 104 (E. C. L. R., vol. 81), a wharfinger was held not liable for a false receipt, which his agent had given, representing that goods had been received at the wharf, which had not so been received. In neither of these cases did the principal authorize or in any way adopt or obtain the benefit of the fraudulent act. But does this principle apply to fraud committed in the making of contracts which the principal has adopted, and of which he has claimed and obtained the benefit?

The contract is made by the agent for the principal, but when made, if authorized or adopted, it becomes in law the contract of the principal. Can the principal treat the contract as his, and repudiate the fraud upon which it was built as the agents? In the making of the actual contract, when the agent speaks he does so with the voice of the principal, for it is the principal's contract he is making.

In the representations which immediately preceded the

contract, is the agent speaking only for himself? If so, on what principle is it that the principal could not sue upon a contract in itself valid, but preceded and brought about by fraudulent representations of the agent? And yet this is the plain law.

This brings me to another difficulty. For it would surely be an anomalous state of things, that the innocent principal could not recover upon his contract *because fraudulently* obtained by his agent, but that, if before discovery the contract be performed, he may ever after keep the benefit of it. Can the buyer's right, upon any sound principle, be made to depend on the extent to which the transaction has been completed? If the fraud had been discovered before the log was cut, could not the buyer have rescinded the contract? If so, why may he not recover now, when the state of things is unaltered by any laches or default of his?

A distinction has indeed been made in equity between contracts performed and unperformed. The latter are sometimes set aside for mistake or surprise, while the former are not. But no such distinction has ever been made in favor of fraud. Fraud, in all Courts and at all stages of the transaction, has, I believe, been held to vitiate all to which it attaches.

Next, as to the authorities.—There is, I believe, no case in which the principal's immunity, under such circumstances, has been established. The only dictum in favor of it is, I believe, that of Lord Campbell, in the *course of argument* in *Wilde* v. *Gibson,* 1 H. L. 605, 615. It may be doubted if it is correctly reported, at any rate it is to be taken, in my opinion, in reference only to the point then under argument.

The authorities the other way are as it seems to me overwhelming. Baron Parke, in *Moens* v. *Heyworth,* 10 M. & W. 157, says:—"To support this action for false representation, it is necessary "to prove that by words or acts of the defendants, *or their agents,* it was made falsely, and for the improper purpose of inducing the other party to

purchase." Again, in *Wilson* v. *Fuller,* 3 Q. B. 77 (E. C. L. R., vol. 43), Tindal, C. J., in delivering the considered judgment of the full Court of Exchequer Chamber, says:—"There was there a fraudulent concealment by Wadeson (the agent) which it must be admitted would *bind Mrs. Wilson if proved.*" And here Wadeson was only agent and Mrs. Wilson avowedly innocent, and the action against her, as here, for deceit. Again, the Chief Justice, says:—"As to the representation made by Wadeson, *which if fraudulent it may be admitted would bind her,*" &c. And again, in the much canvassed case of *Cornfoot* v. *Fowke,* 6 M. & W. 373, Baron Parke, who certainly was not disposed to overstrain the rigid rules of law in favor of any general views of equity, said:—"*It must be conceded* that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, *knowingly commit a fraud in making it, not only is the contract void but the principal is liable to an action.*" Lastly, this *point was decided in Hern* v. *Nichols,* 1 Salk. 289, often quoted, and so far as I know never impeached.

To these dicta must be added the authority of the Exchequer Chamber in a still later case, *Omrod* v. *Huth,* 14 M. & W. 651. It was an action for deceit for fraudulently putting forward certain parcels of cotton as fair samples; and the defendants, the sellers, were there charged, as here, with making the fraudulent representation. At the trial it appeared that the sale was by the defendants' brokers. Coltman, J., who tried the cause, directed the jury, "That unless they could infer that the defendants, or their brokers, were acquainted with the fraud that had been practiced in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to the verdict." On a bill of exceptions the Exchequer Chamber upheld this ruling, saying:—"If, indeed, the representation was *false to the knowledge of the party making it,* this would be conclusive evidence of fraud." And the "party making it" in that case was, if anybody, the agent.

I find no case in which this principle has been seriously doubted. I find no text writer who does not adopt it. It is well stated in Mr. Story's Principal and Agent at sect. 134: "For where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestae*." And again, at sect. 135, he says:—"If the agent at the time of the contract makes any representations, declaration, or admission, touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself."

The defendant has adopted the sale made by his agent and received the price. He has, by the fraudulent statements of the agent, obtained rather more than twice what he could have obtained by an honest sale. It is not the case of any matter collateral, as a warranty may be. It is not the case of a representation made out of and beyond the particular business then transacting by the agent on the principal's behalf. It is the representations made in the very dealing itself, in the conversation that resulted in the contract, that are in question.

The defendant claims the right of separating the contract from that which induced it, of holding the price and ignoring the false statements which largely enhanced it. In my opinion, justice, the common reason of mankind, and every sound rule of law are opposed to his doing so. Whatever his previous authority to the agent, whatever his own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether.

There are, no doubt, many frauds committed by agents which would not bind their principals. But I hold that the statements of the agent which *are involved in the contract as its foundation or inducement* are in law the statements of the principal.

To this most equitable and reasonable extent the iden-

tity of the principal with the agent has I conceive been long established in our laws. It has been much discussed whether an untrue but innocent statement by an agent, when coupled with a knowledge in the principal, would support an action of deceit against the principal or bar an action on the contract. Such were the cases of *Cornfoot* v. *Fowke* and *Fuller* v. *Wilson*.

The artificial identification of the agent and principal, by bringing the words of the one side by side with the knowledge of the other, induced the apparent logical consequence of fraud. On the other hand the real innocence of both agent and principal repelled the notion of a constructive fraud in either. A discordance of views, varying with the point from which the subject was looked at, was to be expected. And the result is found in the elaborate reasoning of the judgments in the above cases.

But what bearing have they upon the case now in hand? —a remarkable one. The point now in dispute was tacitly conceded by every one. If the agent's statements were not those of the principal, it was needless to inquire whether they were fraudulent. It would have been enough to establish that what the agent had said he had said without authority, and the immunity of the employer would have been established—it was needless to inquire whether the statement was fraudulent. According to the defendant's argument in the present case, the statements by the house agent in *Cornfoot* v. *Fowke*, not being authorized, in no way affected his principal whether fraudulent or not; and yet the *whole* inquiry was confined to whether they were fraudulent or not—a needless investigation if they did not bind the principal at all.

But the same question has arisen and been the subject of decision in another form, I mean on the question of admissibility of evidence. Whenever the unauthorized statements of the agent are not in law the statements of the principal, they would not be admissible in evidence against the principal. To whatever extent they are admissible, they

must in law be considered the statements of and binding on the principal.

Now, what is the rule and where is the line between admissibility and inadmissibility drawn? There was no more careful and accurate judge than Sir William Grant, and he states the rule thus:—"What the agent has said may be what constitutes the agreement of the principal, or the representations or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation:" *Fairlie* v. *Hastings,* 10 Ves. 126. And this, said Tindal, C. J., in *Garth* v. *Howard,* 8 Bing. 451, 453 (E. C. L. R., vol. 21), "is the leading case on the subject."

Other judges have laid down a similar rule. In *Langham* v. *Allnutt,* 4 Taunt. 511, 519, Gibbs, C. J., says:—"When it is proved A is agent of B, whatever A does, or says, or writes, in *the making of a contract as agent* of B, is admissible in evidence, because it is part of the contract which he makes for B, and therefore binds B." In *Doe* v. *Martin,* 4 T. R. 39, 66, Lord Kenyon says:—"Without imputing any fraud to Martin, and, indeed, it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails, both in Courts of law and equity; and, therefore, whatever misconduct and fraud are imputed to Cruttenden, it must affect his principal, Martin."

It remains to answer some of the objections made. It is said that the reason why no action could be maintained by the seller on the contract is, that the principal cannot stand in a better position than the agent who actually made the contract; and that as the agent could not sue on the contract the principal cannot. But this reasoning applies only to derivative rights. Whereas here the contract is the principal's from the first though made by the agent; and as his title is not derivative so it is not prejudicially affected by any acts but those which are in the eye of the law his own.

Another principle has been invoked, as it seems to me improperly. When one of two innocent people must suffer, he who has intrusted the fraudulent agent must it is said be content to bear the loss. If such a principle applied to this case, I should have thought that he who intrusted was the seller and not the buyer, who was deceived. But to me it appears to have no application. It applies, as it seems to me, only to cases in which by the fraud of the agent both parties, he who employed him as agent and he who dealt with him, have been defrauded. Whereas here there is only one sufferer, the other being largely a gainer by the deceit as matters now stand; and if made to pay the excess of price back would still retain the real value of the log.

I will only add that the great importance of the question, and the sincere respect I have for those who take an opposite view, have induced me thus fully to vindicate what I believe to be the law, in favor of those who have been cheated and against those who claim to retain the proceeds of the cheat.

MARTIN, B. This action was tried before me without a jury, and the facts are these: The defendants authorized a person called Youngman to sell a log of mahogany. Youngman fraudulently concealed from the plaintiff a defect in the log, who, upon the assurance that it was sound, bought it at 3*s.* per foot. There was evidence that it was not worth 1*s.* 3d. The price was payable by two bills, which were given to the defendants and paid by the plaintiff. The log was delivered to the plaintiff and sawn up, and partly used by him. It was admitted that neither directly or indirectly were the defendants personally guilty, or had they any knowledge of the fraud; and the question is, whether they are liable to an action for a false and fraudulent misrepresentation.

The circumstance that the defendants have received the full consideration of a contract which the plaintiff might have avoided for fraud, and the alleged injustice of permitting them to retain the price of 3*s.* per foot for an article

worth only 1*s.* 3d., and which price was agreed to be paid by the plaintiff upon a false and fraudulent misrepresentation made by the agent of the defendants, has been strongly urged as creating a liability; but, notwithstanding, I think there is none. The contract was procured by fraud, and was therefore voidable by the plaintiff. It was not void, for the plaintiff might have insisted upon its performance. It was voidable at his election. The fraudulent misrepresentation was not part of the contract; it was a collateral matter which would have entitled the plaintiff to have avoided it. There would have been no legal objection to the defendants suing as plaintiffs in an action; but it is clear that a plea of fraud would have been a good answer. The plaintiff only knew Youngman in the transaction; and although the defendants might sue upon the contract, they could have no greater right against the plaintiff than Youngman had, and as the plaintiff would have an answer to the action if brought by Youngman, he must also have one to an action brought by the defendants. So, also, I apprehend, if the plaintiff had discovered the defect before he had so used the log as to incapacitate him from returning it, he might have returned it to the defendants and rescinded the contract. In truth the contract was voidable for fraud against every one so long as it was executory and capable of being avoided. But the contract has been executed. The plaintiff has taken the log and used it, and the defendants have received the price, and whatever remedy exists for the plaintiff must be by way of action. The allegation in the declaration upon which the plaintiff's right of action rests is, that *the defendants made a false and fraudulent representation*. But how can it be said with truth that the defendants made such a representation? They themselves never made it; they never authorized Youngman to make it; they never knew of it until long afterwards and until after the contract had been executed. All that they did was to authorize Youngman to sell the log honestly. No doubt they afforded the occasion upon which the fraud-

ulent misrepresentation was made, but they did nothing more; and in my opinion this is too remote to render them liable to this action. Youngman, however, is clearly liable upon the facts as assumed, and if he be a solvent man the plaintiff may obtain from him the redress to which he is entitled. I do not think the circumstance, that he possibly may be a person not capable of paying damages, is one which can legally be taken into consideration in order to determine the liability of the defendants. The ability to pay does not affect the question of legal liability for a wrong: all that can reasonably be required is, that the law should afford redress against the individual who commits it.

For these reasons, if there were no authorities upon the subject, I should be of opinion that the defendants are not responsible, but I think the weight of authority is in favor of the defendants. It is true there are dicta of most eminent Judges in favor of the action, but they are dicta only. The first is by Lord C. J. Tindal, in the judgment of the Exchequer Chamber in Wilson *v.* Fuller, 3 Q. B. 68 (E. C. L. R. vol. 43), that a principal is bound in a civil action by a fraudulent concealment of which his agent was guilty. The next is by Baron Parke in Cornfoot *v.* Fowke, 6 M. & W. 373, that if one employ an agent to make a contract, and that agent (though his principal be perfectly guiltless) knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action, and he cites Hern *v.* Nichols, 1 Salk. 289. This was a decision at *nisi prius* by Lord Holt, and, as in many other old cases, it is extremely difficult to say whether it was an action upon a warranty or one for deceit, properly so called; if it were upon a warranty or contract it would be no authority upon the present point. In Coleman *v.* Riches, hereinafter mentioned, Mr. J. Cresswell, in speaking of it, says it was not a case of fraud. So also, in Murray *v.* Mann, 2 Exch. 538, Baron Parke again said, if an agent be found guilty of fraud in transacting his principal's business the

principal is responsible. There was another case referred to, Grammar *v.* Nixon, 1 Str. 653, but in reality it has no bearing upon the present. It was the case of a servant, not an agent. The relation of master and servant is entirely different from that of a principal vendor and his agent or brokers to sell. I quite agree that no higher authority of the kind can be cited than the opinions of Lord C. J. Tindal and Baron Parke, but, upon the other hand, there is the authority of the Lord Chancellor, Lord Campbell, in Wilde *v.* Gibson, 1 H. L. 605, the other way. He there says: "In an action upon contract the representation of an agent is the representation of the principal, but in an action on the case for deceit the misrepresentation must be proved against the principal." This, in my opinion, is an accurate statement of the law. But I think this case is concluded by adjudged cases. In the case of Grant *v.* Norway, 10 C. B. 665 (E. C. L. R. vol 70), where the master of a ship had signed bills of lading for goods which had never been shipped, it was held that his doing so did not make his owner responsible to one who had made advances upon the faith of the bills of lading. That is a much stronger case than the present. The master of the ship is the general agent of the owner; Youngman was not the general agent of the defendants; he was merely the agent to sell this single log. The representation of the master was a false and fraudulent misrepresentation; it was false, and false to his knowledge, and this constitutes a false and fraudulent misrepresentation: Pothill *v.* Walters, 3 B. & Ad. 114 (E. C. L. R. vol. 23); yet the owner was held not to be responsible. So also, in Coleman *v.* Riches, 16 C. B. 104 (E. C. L. R. vol. 81), the defendant was a wharfinger at Bristol, and one Board was his general manager at the wharf. The plaintiff had bought a parcel of wheat from one Lewis; Board signed a wharf receipt, in the usual form, for the wheat as received from Lewis at the wharf. Upon the production of the receipt, and on the faith of it, the plaintiff paid the price to Lewis. In fact,

the wheat had not been delivered, and the receipt was fraudulently concocted between Lewis and Board. The Court of Common Pleas held that the defendant was not liable in an action for a false and fraudulent misrepresentation. This case seems to me in point, and I concur with what Mr. J. Cresswell says, which I think applicable to the present, "that the agent was employed, not to make statements, but contracts." It has been decided that an agent to sell a chattel has not authority to give a warranty except specially authorized. This matter was much discussed in Coleman *v.* Riches, 16 C. B. (E. C. L. R. vol. 81), and Mr. J. Cresswell expresses his clear opinion that the agent has no such authority, and this is in accordance with principle. The mere authority to an agent to sell must be to sell according to the ordinary rule of law, and that is *caveat emptor*. But the point has been expressly decided by the Court of Common Pleas in Brady *v.* Todd, 9 C. B., N. S. 592 (E. C. L. R. vol. 99), where it was held that an agent, being a servant, authorized to sell a horse, had not authority to bind his master by a warranty that the horse was sound and quiet in harness. This case therefore substantially overrules the *nisi prius* decision in Alexander *v.* Gibson, 2 Camp. 555. If, therefore, an agent to sell has not authority to bind the principal by a warranty, how is it possible that he can render him liable as upon a false and fraudulent misrepresentation? In my judgment, therefore, the present case is concluded by adjudged cases, and if the plaintiff is to succeed it ought to be by the judgment of a court of error. For my own part, as I have already said, I am satisfied upon legal principle the defendants are not liable. I use the tests applied by Mr. J. Cresswell in Coleman *v.* Riches, 16 C. B. 104 (E. C. L. R. vol. 81). First, was Youngman in fact authorized by the defendants to make the representation? He was not. Secondly, was his situation such as to bring the representation he made within the score of his authority? I think not. He was employed to sell in accordance with

the ordinary rule of law, but he was not employed to represent that to be true which he knew to be false.

For these reasons I am of the opinion that the defendants are not responsible, and that the plaintiff must seek his remedy against Youngman, who, upon the evidence in the case, made the false and fraudulent misrepresentation.

Some passages were referred to from Mr. Justice Story's work, and also some placita from Rolle's Abridgment. They were cited to the Court of Common Pleas in the cases before mentioned, and I do not think it necessary to refer to them.

As to the alleged hardship upon the plaintiff, there is none. He dealt exclusively with Youngman, and if he be not of ability to pay, the plaintiff is only in the condition of all persons who have received a wrong at the hands of a person unable to make redress. As to the defendants, I do not know the authority as to price given by them to Youngman, but it may have been that he was not to sell the mahogany at a lower price than 3s. per foot; in other words, that the defendants would keep their wood if they did not receive in exchange for it a sum of money equal to 3s. per foot. Now the plaintiff has taken the log and has used it. By reason of his own act he cannot restore it to the defendants. Why then should they be deprived of the price or any part of it? It is said that the circumstance of the defendants having received the price agreed to be given upon the false representation made by their agent, renders them liable to pay the difference between the contract price and the real value. But is this so in reason and justice? It may well have been that the defendants insisted that no lower price should be accepted than 3s. per foot. If the log had turned out worth 20s. per foot the plaintiff would have had the benefit. The defendants may have only received what they insisted upon having before they parted with the log. The plaintiff by his own act has deprived the defendants of the possibility of its ever being restored to them. What

right has he in reason or justice to deprive the defendants of any portion of that price which they may have insisted upon having before they parted with their property? If Youngman has committed a wrong he is responsible for it; but why are the defendants, who have committed none, to be deprived of their property, and also of a part of what may have been the stipulated price? The maxim of law is, *In pari delicto potior est conditio defendentis.* I think the same rule ought to prevail in this case, where there is equal innocence.

The result of our judgment is that the rule [to take off the non-suit] will be discharged.

BARWICK *v.* ENGLISH JOINT STOCK BANK.

In the Exchequer Chamber, 1867.

Law Reports, 2 Exchequer Cases, 259.[1]

May 18. The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague Smith and Lush, JJ.) was delivered by

Willes, J.: This case, in which the Court took time to consider their judgment, arose on a bill of exceptions to the ruling of my Brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a

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[1] The statement of facts as given in the report, and the Reporter's notes of the arguments of counsel, and the last part of the opinion relating to a point in pleading are omitted.

Compare: Rhoda *v.* Annis, 75 Me. 17, 1883. (B was the owner of a farm. B employed C to sell the farm. In the course of the negotiations for the sale of the farm to A, C stated "that said farm for several years then last past had produced and cut eighteen tons of hay each year." This and other similar representations were false. A sued B to recover damages for deceit. The Court charged the jury that the "defendant was responsible for all the acts and representations of her agent in making the sale." Judgment for plaintiff, exceptions overruled.)

more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form:—

"Dear Sir—Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis & Son not exceeding 1000 quarters of oats for the use of their contract, I will honor the cheque of Messrs. J. Davis & Son in your favor in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis & Son, are able to continue their contract, and are not made bankrupts.

(Signed) "Don. M. Dewar, Manager."

The plaintiff stated that in the course of conversation as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge

of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above £12,000." The result was that oats were supplied by the plaintiff to Davis to the amount of £1227, that Davis carried out his contract with the government, and that the commissariat paid him the sum of £2676, which was paid by him into the bank. He thereupon handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government cheque, by keeping back from the plaintiff the state of Davis' account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers,

would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in *Udell* v. *Atherton,* the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. In

all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in. *Venire de novo.*

ARMOUR *v.* MICHIGAN CENTRAL R. R. CO.

BEFORE THE COMMISSION OF APPEALS, NEW YORK, 1875.

65 *New York Reports*, 111.

Appeal from a judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of defendant, entered upon the report of a referee.[1]

DWIGHT, C.: The defendant in this action issued at Chicago to the plaintiffs, on October 7, 1867, a bill of lading of 100 tierces of lard of the brand "I. T. Sunderland, M.," containing 36,150 pounds. The bill stated that the lard was received from one D. D. Michaels, and was consigned to the plaintiffs, and was to be transported over the defendant's line and delivered to the consignee or owner at New York, the owner or consignee paying freight. The bill was signed by W. W. Street, agent for the defendants. On October 12, 1867, a similar bill was issued by the defendant to the same consignees of a like number of tierces marked "S.," also received from Michaels, which were to be also transported over the defendant's line and delivered to the consignee or owner at Ward's inspection yards, New York. This bill called for 36,150 pounds of lard, and was signed by the same agent. The freight in each case was not to exceed eighty-five cents per 100 pounds. The defendant, at the time of issuing these bills, had no lard in its possession or under its control. It was induced to issue them from the fact that Michaels exhibited to Street a paper purporting to be a warehouse receipt of one I. T. Sunderland, a warehouseman in Chicago, for 200 tierces of lard in favor of Michaels. This receipt was indorsed over to the defendant

[1] The statement of facts as given by the Reporter, his notes of the arguments of counsel, and opinion of Gray, C., are omitted.

and delivered to Street, who, on the faith of it, issued the two bills of lading already described. The receipt purporting to be signed by Sunderland was a forgery. The result was, that, though the defendant had issued the bills of lading, it had no lard to represent them, nor a right to any lard in Sunderland's warehouse owned by Michaels. The latter person had an interest in some tierces of lard there, but on that a firm, known as Walbridge, Watkins & Co., had a prior lien and were entitled to the possession. The defendant was informed by Michaels, at the time that the bills of lading were issued, that he intended to use them at bank on the days on which they were respectively dated. No particular inquiry was made as to the genuineness of the warehouse receipt: the defendant's agent, Street, having confidence in Michaels, and having constant transactions with him. At the times above specified, Michaels drew his sight drafts on the plaintiffs, payable to the order of a bank in Chicago in two sums of $3,600 each. The bills of lading accompanied the drafts, which were accepted and paid by the plaintiffs on the faith thereof.

As between the common carrier and the plaintiffs, this was a New York contract. It was to be performed in New York, and the acceptance of the drafts was made here.

After the defendant had discovered the forgery of the warehouse receipt, made over to it by Michaels, on October 23, it commenced a replevin suit against I. T. Sunderland, the warehouseman and took out of his possession 197 tierces of lard and shipped them to New York. These tierces did not have the same brands as those mentioned in the forged receipts. After the arrival of these tierces in New York, Walbridge, Watkins & Co. replevied them by an action in the Supreme Court, commenced November 1, 1867, against the Hudson River Railroad Company, in whose possession they were. The plaintiffs received formal notice of this second replevin suit on December 10, but took no steps to defend the action. Judgment was subsequently recovered by Walbridge & Watkins against that company, it being

adjudged that they had the right to recover the possession of the lard.

The plaintiffs duly demanded the lard of the defendant. Its value in New York, after deducting freight, was $7,935.45.[2]

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It is now necessary to consider how far the fact that the company had no lard affects this question. This inquiry divides itself into two branches. One concerns the power of Street to bind the company by issuing bills of lading when it has no goods to correspond with the bills. The other is to consider the effect of the bills, assuming that the agent had the requisite authority. The defendant insists that Street could not bind it by issuing fictitious or non-representative bills of lading. It claims that his authority was confined to bills for goods actually within its control. It cites, to this effect, Grant *v.* Norway (10 Com. Bench, 665); Schooner Freeman *v.* Buckingham (18 How. [U. S], 182).

Grant *v.* Norway has been subject to much and severe criticism, as being adverse to the general view prevailing in the courts of this State, where confidence has been reposed in an agent and an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted. When one of two innocent persons must suffer in such a case, that person must bear the loss who reposed the confidence. So far as Grant *v.* Norway stands in the way of this doctrine, it must be deemed to be overruled. (Remarks of Davis, J., in N. Y. and N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 73.) Grant *v.* Norway, however, is not precisely parallel with the present case. In that case the bill of lading was issued to a party who knew that the bill of

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[2] His discussion of the question of what would have been the rights of the plaintiff in case the defendant had had the lard in its possession is omitted.

lading was issued by an agent without authority, and was then transferred to a purchaser acting in good faith. It may, accordingly, be said with plausibility that the representation was made to the assignee, who simply acquired the title of the fraudulent consignee. It would have resembled the case at bar if the plaintiffs had known of the forgery of Michaels when they took the bills of lading, and had then transferred them to persons paying value and acting in good faith. The case would then have been governed by the rule that an assignee of a thing in action must abide by the case of him of whom he buys. (Remarks of Selden, J., in Griswold *v.* Haven, 25 N. Y. 604-606.)

Street, having power to issue bills direct to consignees for goods actually in the possession of the defendant, and the present bills being in no ways distinguishable in form from those which were usually employed, he must be considered as having the necessary authority as to the plaintiffs acting in good faith.[3]

All concur, except Earl, C., dissenting.

Judgment reversed.[4]

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[3] In the rest of the opinion the learned Commission maintains that, assuming Street to have authority to sign the bill of lading, the defendant is estopped from denying it had the lard.

[4] *Compare:* Pollard *v.* Vinton, 105 U. S. 7, 1881. (C was the general agent of B for shipping purposes at X. C signed and gave to D a bill of lading for goods purporting to have been shipped on B's boat at X. No such goods had been shipped. D assigned the bill of lading for value and without notice of the fraud to A. A sued B for the non-delivery of the goods. Judgment for B affirmed. Miller, J., "This authority [of C's] to execute and deliver bills of lading has two limitations; namely, they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat. Before the power to make and deliver a bill of lading some person must have shipped goods on the vessel." p. 9.)

Bank of Batavia *v.* New York, Lake Erie and Western R. R. Co., 106 N. Y. 195, 1887. (C was the agent of the B R. R. Co. authorized to issue bills of lading for goods received. C in collusion with D gave D a bill of lading reciting that the B Co. had received certain goods from D for shipment, signing the bill as agent for the B Co. No such goods had been received. D assigned the bill of lading to A for value. A sued the B Co. for the non-delivery of the goods and recovered. Judgment affirmed. Finch, J.: "It is settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact neces-

sarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.

"It is obvious, also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent."

Phillips *v.* Mercantile National Bank, 140 N. Y. 556, 1894. (The Bank B appointed C cashier, and gave him authority for the purposes of the bank to draw checks on other banks in favor of third persons. For his own fraudulent purpose he drew checks on the A bank in favor of third persons, endorsed the names of the payees, collected the moneys from A through a broker, and absconded. *Held,* that B was estopped from denying the validity of the checks.)

REYNOLDS *v.* WITTE.

In the Supreme Court of South Carolina, 1879.

13 South Carolina Reports, 5.[1]

Mark Reynolds sent to his agents, J. M. Caldwell & Sons, certain monies to invest for him, Reynolds. J. M. Caldwell & Sons lent the money to C. O. Witte and took from him notes with collateral security. It was the understanding of all parties that J. M. Caldwell & Sons should collect the interest and the principal for Reynolds and retain possession of the collateral. J. M. Caldwell appropriated the collateral to their use and became insolvent. Witte claimed that he, Witte, had a right to recover from Reynolds the value of the collaterals. The controversy was submitted to the Circuit Court under the provisions of Section 389, without action. The Circuit Court found that Reynolds was not liable for the fraud of J. M. Caldwell & Co. Witte brought this appeal.

McGowan, A. J.:

There is nothing to distinguish this from the ordinary case where one, for convenience, employs another to act as his agent in a particular business, or to exempt Reynolds and Caldwell & Sons from the principles which ordinarily attach to the relation of principal and agent. Of all these principles there is not one more important than that which makes the act of the agent, within the scope of his authority, the act of the principal—"*qui facit per alium, facit per se.*" Caldwell & Sons were the agents of Reynolds, and they misappropriated, and thereby, for the purpose of this case, destroyed the collaterals of Witte. Is Reynolds liable for that

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[1] The facts are restated, and only so much of the opinion of the Court is reprinted as relates to the question stated.

act? If Reynolds himself had done the act there can be no doubt that he would have been liable to Witte. Then what is his responsibility when not done by himself, but by his agents? Must the result to Witte be different for the reason that Reynolds chose to perform his part of the business through agents selected by himself? If Caldwell & Sons as the agents of Reynolds had lost these collaterals by *negligence merely*, if they had left their safe unlocked and in consequence the bonds had been stolen, it is conceded that Reynolds would have been liable; but it is insisted that he should not be held liable for the loss occasioned by their *"criminal act wilfully committed."*

The circuit Judge says: "The only question in the case is whether the plaintiff is liable for the wilful misappropriation of the defendant's securities by his agent in the absence of all fault on his part. The law seems to be well settled that whilst the principal is liable for the negligence of his agent, he is not liable for the criminal acts wilfully committed by him—such acts not being within the scope of his agency."

It may be true that, generally, the principal is not liable *criminally* for the acts of his agent done without his authority, nor *civilly* to third persons with whom he has no privity for his wilful trespasses.

This is not a *criminal* but a *civil* claim to charge Reynolds with the value of the collateral appropriated by Caldwell & Sons. It is difficult to understand upon what ground the principal should be held liable for the *negligence* of his agent and not for his *fraud*, where the act is done or omitted to be done to the very property as to which the agency exists and in the course of the agency. Fraud by which the property is lost is generally considered one of the forms of gross negligence. What is the proper understanding of the phrase "within the scope of the agency?" Does "the scope" include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent

is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within "the scope of the agency;" but tested by the connection of the act with the property and business of the agency, *fraud* in taking the very property is as much "within the scope of the agency" as negligence in allowing others to take it. The proper inquiry is, *whether the act was done in the course of the agency and by virtue of the authority as agent.* If it was, then the principal is responsible, whether the act was merely negligent or fraudulent. Here the fraudulent act was the appropriation of the very property of the agency—without which agency they would not have had possession of the property and could not have done the act.

We have not had our attention directed to any decided case precisely in point, nor have we been able to find one, but the principles announced by eminent judges and elementary writers fully cover the point.

In the case of Scott, Williams & Co. *v.* Joseph Crews, 2 S. C. 522, the defendant, Crews, borrowed money from the plaintiffs, bankers, gave them notes for the money, and secured them by pledging as collateral bills of the bank of the State. These bills were not fraudulently appropriated by the bank, but were taken from its vaults by robbery. The question was simply one of negligence as bailees, and upon that issue the plaintiffs were held not liable.

The case of Foster *et al.,* Executors, *v.* President and Directors of the Essex Bank, 17 Mass. 478, comes much nearer the precise point involved here. A special deposit of $50,000 of gold was made, which was stolen by the cashier and the chief clerk of the bank. The corporation was exonerated from responsibility, upon the grounds that it was

a gratuitous deposit without compensation, but for safe keeping merely, and the theft was not the act of the corporation, but the unauthorized act of the cashier and clerk, outside of their business as officers, and therefore as mere strangers. The whole case shows that if the corporation, through its proper officers and as its own act, had fraudulently appropriated the money, the court would have held them liable. Chief Justice Parker, in delivering the judgment of the court, states the principle as well as its qualifications. He says: "It was contended by one of the counsel for the plaintiff, as a proposition universally true, that the principal is civilly answerable for all frauds done by his agents; and he is supported in the use of this language by a doctrine of Lord Kenyon, in the case of Doe *v.* Martin; and also by Lord Ellenborough in 1 Camp. 127, and yet it must strike the mind of every man of sense that this universal proposition will admit of, and, indeed, upon principles of common sense, actually requires qualifications. No one will suppose, if my servant commits a fraud relative to a subject that does not concern his duty to me, that I shall be civilly answerable for such fraud. If I send him to market and he steps into a shop and steals, or, upon false pretences, cheats the shopkeeper of his goods, I think that all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire. *The proposition can be true only when the agent or servant is, while committing the fraud, acting in the business of his principal or master.*"

In Story on Bailments, it is said: "But good faith alone is not sufficient. If there is any loss occasioned by their negligence or mistake or inadvertence, which might fairly have been guarded against by ordinary diligence, they will be held responsible therefor; *and*, a fortiori, *they will be held responsible when they are guilty of any misfeasance.*"

In Smith's Mercantile Law it is said: "The principal has been thought to be responsible, not merely for the negligence, but for the deliberate fraud of his agent committed

in the execution of his employment, though without the principal's authority, as, for instance, by selling false jewels for true ones." The reason given for this by Lord C. J. Holt, appears a sensible one. "Seeing," says he, "that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver, should be the loser than a stranger. Such, certainly, was the opinion of the Roman lawyers."

The principle is well stated in Story on Agency, Section 452: "It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences and other malfeasances, misfeasances and omissions of duty of his agent, *in the course of his employment,* although the principal did not authorize or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat superior;* and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him, though the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

The judgment below is reversed and a new trial ordered.

Willard, C. J., and McIver, P. J., concurred.[2]

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[2] *Compare:* Foster *v.* The Essex Bank, 17 Mass. 479 1821. (A left at the bank, B, a cask containing $50,000 in gold. The bank, through its cashier, C, accepted the cask "for safe keeping," but the bank received no reward. A gave several orders on the bank to pay out different sums of money from the cask to the holders of the orders, and the cask was opened by C for this purpose. C took and converted to his own use

$32,000 out of the cask. After A's decease, C gave to his executors a memorandum signed by C as cashier, admitting that the bank had on special deposit for them as executors the amount deposited by A less only A's drafts. *Held,* that it was within the province of the bank to receive the deposit; that the extent of the bank's duty as bailee was to keep as their goods of a similar kind; that the bank would be liable for the fraud of their agent when the agent was acting within the scope of his authority; that the cashier when he went to the cask to abstract the gold was not acting within the scope of his authority, and that, therefore, as between the executors of A and the bank, the loss resulting from C's fraud should fall on the estate of A.)

Dougherty *v.* Wells, Fargo & Co., 7 Nev. 368, 1872. (A held a certificate of deposit given him by the B Express Company at Y. C was B Co.'s agent at X. A gave C the certificate with directions to send to Y, have renewed, and returned to him, A, at X. C obtained the money on the certificate, and did not return to A either the money or the certificate. A sued the B Co. *Held,* on appeal that the plaintiff could recover, on the ground that C was held out by the B Co. as a person to be trusted as their agent in the character of business committed to him by A. p. 373.)

THE BRITISH MUTUAL BANKING CO. *v.* CHARNWOOD FOREST RAILWAY CO.

In the Court of Appeal, 1887.

Law Reports, 18 *Queen's Bench Division,* 714.

Appeal from an order of the Queen's Bench Division (Manisty and Mathew, JJ.) directing judgment to be entered for the plaintiffs.

The action was brought to recover damages for fraudulent misrepresentations alleged to have been made by the defendants through their secretary. At the trial before Lord Coleridge, C. J., it appeared that certain customers of the plaintiffs had applied to them for an advance on the security of transfers of debenture stock of the defendant company. The plaintiffs' manager called upon Tremayne, the defendants' secretary, and was informed in effect that the transfers were valid, and that the stock which they purported to transfer existed. The plaintiffs thereupon made the advances. It subsequently appeared that Tremayne, in conjunction with one Maddison, had fraudulently issued certificates for debenture stock in excess of the amount which the company were authorized to issue, and the transfers as to which the plaintiffs inquired related to this over issue. The plaintiffs accordingly lost their security. The defendants did not benefit in any way by the false statements of Tremayne, which were made entirely in the interest of himself and Maddison. There was some question whether Tremayne was still secretary at the time the statements were made, but the jury found that the inquiries were made of him as secretary, and that the defendants held him out as such to answer such inquiries. The jury assessed the damages, and the Chief Justice left either of the parties to move for judgment. A motion was accord-

ingly made on behalf of the plaintiffs before Manisty and Mathew, JJ., who directed judgment to be entered for them.

The defendants appealed.[1]

Lord Esher, M. R. In this case an action has been brought by the plaintiffs to recover damages for fraudulent misrepresentation by the defendants, through their secretary, as to the validity of certain debenture stock of the defendant company. The defendants are a corporation, and the alleged misrepresentations were in fact made by a person employed in the capacity of their secretary, and it cannot be doubted that when he made the statements he had a fraudulent mind, and made them knowing them to be false.

I differ from the judgment of the Divisional Court, but I do not think the ground on which my decision is based was present to the minds of the learned judges. The point principally argued in the Divisional Court seems to have been that the defendants could not be liable on account of their being a corporation. It seems to me, however, that there is a defect in the plaintiffs' case irrespective of the question whether the defendants were a corporation or not. The secretary was held out by the defendants as a person to answer such questions as those put to him in the interest of the plaintiffs, and if he had answered them falsely on behalf of the defendants, he being then authorized by them to give answers for them, it may well be that they would be liable. But although what the secretary stated related to matters about which he was authorized to give answers, he did not make the statements for the defendants but for himself. He had a friend whom he desired to assist and could assist by making the false statements, and as he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms, that to bind the principal the agent must be acting "for the benefit" of the principal. This,

[1] The Reporter's notes of the argument of counsel are omitted.

in my opinion, is equivalent to saying that he must be acting "for" the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest. The attention of the learned judges seems to have been drawn off from this view of the case by the argument founded on the defendants being a corporation, and I think their judgment must be overruled.[2]

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[2] The opinion of Bowen, L. J., and Fry, L. J., who concurred in allowing the appeal, are omitted. Fry, L. J., follows the reasoning of the Master of the Rolls; Bowen, L. J., while maintaining that a principal cannot be held liable for a deceit committed by his agent for the agent's benefit, holds that in this case, had the directors of the corporation authorized the deceit, as such an action was beyond the power of the corporation, the plaintiff could not have held the corporation liable in damages.

SECTION 2.—LIABILITY FOR POSITIVE MISFEASANCE CONTINUED—WILFUL INJURY BY SERVANT.

M'MANUS *v.* CRICKETT.

IN THE COURT OF KING'S BENCH, 1800.

1 *East's Reports*, 106.

This case was very much discussed at the bar, upon a motion to set aside a verdict for the plaintiff and enter a nonsuit, by Gibbs and Wood, against the rule, and Garrow and Giles in support of it. The Court took time to consider of their judgment; and afterwards entered so fully into the cases cited and the arguments urged at the bar, that it is unnecessary to detail them in the usual form.

Lord KENYON, C. J., now delivered the unanimous opinion of the Court.

This is an action of trespass, in which the declaration charges that the defendant with force and arms drove a certain chariot against a chaise in which the plaintiff was riding in the king's highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial it appeared in evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present, nor did he in any manner direct or assent to the act of the servant, and the question is, if for this wilful and designed act of the servant an action of trespass lies against the defendant his master? As this is a question of very general extent, and as cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject before

we gave our opinion; and after an examination of all that we could find as to this point, we think that this action cannot be maintained. It is a question of very general concern and has been often canvassed; but I hope at last it will be at rest. It is said in Bro. Abr. tit. Trespass, pl. 435: "If my servant contrary to my will chase my beasts into the soil of another I shall not be punished." And in 2 Roll. Abr. 553: "If my servant without my notice put my beasts into another's land, my servant is the trespasser and not I—because by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." I have looked into the correspondent part in Vin. Abr. and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in Noy's Maxims, ch. 44. "If I command my servant to distrain, and he ride on the distress, he shall be punished not I." And it is laid down by Holt, C. J., in *Middleton* v. *Fowler,* Salk. 282 as a general position, "that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him." Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for such act. Such upon the evidence was the present case; and the technical reason in 2 Roll. Abr. with respect to the sheep applies here; and it may be said that the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant who had not purpose but the execution of his master's orders; but the form of those actions proves that this action

of trespass cannot be maintained; for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shows, that where the servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. If this were otherwise the plaintiffs in the cases mentioned in 1 Lord Raym. 739. (one where the servants of a carman through negligence ran over a boy in the streets and maimed him; and the other, where the servants of A with his cart ran against the cart of B and overturned it, by which a pipe of wine was spilt;) must have been nonsuited from their mistaking the proper form of action, in bringing an action upon the case, instead of an action of trespass; for there is no doubt of the servants in those cases being liable as trespassers, even though they intended no mischief; for which, if it was necessary, *Weaver* v. *Ward* in Hobart 134, and *Dickinson* v. *Watson* in Sir Thomas Jones 205, are authorities. But it must not be inferred from this that in all cases where an action is brought against the servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. *Michael* v. *Allestree* in 2 Levinz 172, where an action on the case was brought against a man and his servant for breaking a pair of horses in Lincoln's Inn Fields, where being unmanageable they ran away with the carriage and hurt the plaintiff's wife, is an instance to shew that trespass on the case may be the proper form of action. And upon a distinction between those cases where the mischief immediately proceeds from something in which the defendant is himself active, and where it may arise from the neglect or other misconduct of the party, but not immediately, and which perhaps may amount only to a non-fea-

zance, we held in *Ogle* v. *Barnes*, 8 Term Rep. 188, that the plaintiff was entitled to recover. The case of Savignac and Roome, 6 Term Rep. 125, which was much pressed as supporting this action, came before the Court on a motion in arrest of judgment; and the only question decided by the Court was, that the plaintiff could not have judgment, as it appeared that he had brought an action on the case for that which in law was a trespass: for the declaration there stated that the *defendant* by his servant *wilfully* drove his coach against the plaintiff's chaise. *Day* v. *Edwards*, 5 Term Rep. 648 was also mentioned; which was an action on the case, in which the declaration charged the defendant personally with furiously and negligently driving his cart, that by and through the furious negligent and improper conduct of the defendant the said cart was driven and struck against the plaintiff's carriage: and on demurrer the Court were of opinion, that the fact complained of was a trespass. And in the last case that was mentioned of *Brucker* v. *Froment*, 6 Term Rep. 659 the only point agitated was, whether evidence of the defendant's servant having negligently managed a cart supported the declaration, which imputed that negligence to the defendant: and the Court with reluctance held that it did, on the authority of a precedent in Lord Raymond's Reports 264 of Turbesville and Stamp. In none of these cases was the point now in question decided; and those determinations do not contradict the opinion we now entertain, which is, that the plaintiff cannot recover, and that a nonsuit must be entered.

Per Curiam, Rule absolute for entering a nonsuit.[1]

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[1] *Compare:* Bowcher *v.* Noirdstrom, 1 Tauton, 568, 1809. (B was the captain of a vessel. He was asleep in the cabin, and the vessel was in charge of the pilot. The vessel became entangled with A's vessel, which was at anchor. The pilot to extricate B's vessel ordered a sailor to cut the hawser attached to A's vessel, which was done. A brought an action of trespass against B. Verdict for A. Rule *nisi* to set aside the verdict. Rule absolute. "The Court held that it did not appear that the captain had done any act in this case." *Sed quære*, if trespass on the case could have been brought?)

Croft *v.* Alison, 4 Barn. & Ald. 590, 1821. (A was owner of a certain chariot. The chariot was standing in the road when it became entangled with a coach belonging to B and driven by B's servant, C. C struck the horses of A; they moved forward and the chariot was overturned and damaged, for which damage A sued B. The Court charged the jury that if the original entangling arose from the fault of C, then the verdict should be for A. *Per curiam*: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment.")

WRIGHT *v.* WILCOX.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, 1838.

19 *Wendell's Reports*, 343.

The suit was brought for an injury sustained by the son of the plaintiff, who was a minor, in being run over by a wagon driven by S. Wilcox, the son of J. Wilcox, whilst in the employment of the father. The plaintiff's son was a very young lad, and on his way to school asked S. Wilcox to permit him to ride; who answered that he might do so, when he got up a hill which he was then ascending. When the hill was ascended, the lad took hold of the side of the wagon between the front and hind wheels. S. Wilcox did not stop his team. He was cautioned by a by-stander that if he did not stop he would kill the boy. He looked behind him; the horses were then walking; and seeing the plaintiff's son and other boys attempting to get on the wagon, he cracked his whip and put the horses upon a trot. The plaintiff's son fell and one of the hind wheels passed over him, and greatly injured him. A joint action was brought against the defendants. A motion was made for a nonsuit, which was denied. The judge charged the jury, that both defendants were answerable whether the injury was wilful, or only attributable to negligence. The jury found a verdict for the plaintiff against both defendants with $109 damages. A motion was made for a new trial.[1]

COWEN, J.: It is impossible to sustain this verdict against the father. It is difficult to infer from the evidence, anything short of a design in Stephen the servant, to throw the plaintiff's boy from the wagon; and the judge, as I

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[1] The statement of facts is slightly abbreviated and the parts of the opinion dealing with questions of practice are omitted.

understand the charge, told the jury that the defendants were jointly liable in that view. If Stephen, in whipping the horses, acted with the wilful intention to throw the plaintiff's boy off, it was a plain trespass, and nothing but a trespass, for which the master of Stephen is no more liable than if his servant had committed any other assault and battery. All the cases agree that a master is not liable for the wilful mischief of his servant, though he be at the time, in other respects, engaged in the service of the former. 1 Chit. Pl. 69, ed. of 1828. *M'Manus* v. *Crickett,* 1 East, 106. Ham. on Part. to Actions, 83. *Croft* v. *Alison,* 4 Barn. & Ald. 590. 1 Chit. Gen. Pr. 80. *Brewcher* v. *Noidstrom,* 1 Taunt. 568. Why is the master chargeable for the act of his servant? Because, what a man does by another he does by himself. The act is within the scope of the agency. Reeve's Dom. Rel. 357. "A master is not answerable," says Mr. Hammond, "for every act of his servant's life, but only for those done in his *relative* capacity. To charge the master, it must always be shown or presumed, that the relation of master and servant subsisted between them in the *particular affair.* If the master is liable under other circumstances, he is so, not *quatenus* master, but as any one would be who instigates an injury." The dividing line is the wilfulness of the act. If the servant make a careless mistake of commission or omission, the law holds it to be the *master's business negligently done.* It is of the very nature of business that it may be well or ill done. We frequently speak of a cautious or careless driver in another's employment. Either may be in the pursuit of his master's business, and negligence in servants is so common, that the law will hold the master to the consequences as a thing that he is bound to foresee, and provide against. But it is different with a wilful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the *particular affair,* there is, then, no longer the presumed relation of master

and servant. The distinction seems to resolve itself into a question of evidence. A man shall be presumed to intend the ordinary consequences of his own acts; and especially so far as such consequences may be innocent of all evil intention; for these he may be safely held accountable. But for those which are remote or barely possible, he is not accountable; and if they be at the same time criminal, it would be violating one of the plainest principles of presumptive evidence to say that he intended them. "The master's liability has never been questioned," says Judge Reeve, "when a servant does an act injurious to another, through *negligence* or *want of skill,* on the principle that the master should at his peril employ servants who are skilful or careful." Reeve's Dom. Rel. 357, 8. He admits that the English cases deny the master's liability where the servant's act is wilful; but questions the soundness of the distinction, if the wilful act be done *in the immediate performance of his master's business;* in which I understand the learned judge at the circuit to have followed him in the case at bar. The answer is that the law holds such wilful act *a departure from the master's business.* Judge Reeve remarks that one of two innocent persons must suffer, and that should be the man who put it in the power of the servant to do the injury; and the reason is as strong that the master should run the risk of his servant's unruly passions, as his want of care. Clearly the argument proves too much. It would make the master accountable for every mischievous act of the servant, which he is enabled to commit in consequence of the general relation; for aught I see, including the credit which the servant may obtain with his merchant. The learned writer puts a distinction involving the very question we are considering. A servant driving a wagon, leaves it and commits an assault and battery; for that he admits the master is not liable; otherwise, if he should drive it violently over a man with intent to injure him. "In the first place, (he says,) the servant had abandoned his master's business; in the latter, he was in

the immediate pursuit of it; in the first, he was not driving his master's wagon, in the last he was." Now the authorities deny that when the servant *wilfully* drives over the man, he is in his master's business. They hold it a departure, and a going into the servant's own independent business. It is true, he is still driving his master's wagon, and so he would be though he should use it to run away from service. It will hardly be contended, that after he has completed his escape, the master would be liable for his running over a man; and why? Because he has taken up a new and distinct object of his own, and is engaged in executing that; and has he not, to every material purpose, done the same whenever he commits a wilful injury to another? In *M'Manus* v. *Crickett,* the servant, while driving a chariot on the road as authorized by his master, *wilfully* drove against the plaintiff's chaise. Lord Kenyon said that the act being wilful, the chariot might be considered for that purpose in the possession of the servant as his special property, and not the master's. He said: "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." He puts the master's liability on the ground of negligence or unskilfulness with no purpose but the execution of his orders. Judge Reeve says it is difficult to reconcile such a doctrine with the cases which hold a sheriff liable for the wilful misfeasance of his deputy. But such cases are clearly, as stated by Mr. Hammond, exceptions to the general rule for reasons of policy. Hamm. on Part. to Actions, 83, 4. The master is liable in *case* only; but the action against the sheriff is *trespass,* and lies against him for every act of his officer done *colore officii,* even the execution of process after the return day, and the seizing of the goods of a third person. Id. *Ackworth* v. *Kempe,* 1 Doug. 40. *Parrot* v. *Mulford,* 2 Esp. N. P. Cas. 585. So for arresting under

color of process without having any in his hands. *Smart* v. *Hutton,* 2 New. & Mann. 426.

The line where the master's liability shall terminate must be placed somewhere; and the acquiescence of Westminster Hall for many years in the rule we have cited as laid down by Lord Kenyon, is an evidence of the common law not to be resisted, especially as it will not be found, I imagine, to conflict with any general principle of that law.

New trial granted.

ROUNDS *v.* THE DELAWARE AND LACKAWANNA RAILROAD COMPANY.

IN THE COURT OF APPEALS OF NEW YORK, 1876.[1]

64 New York Reports, 129.

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on a verdict. (Reported below, 3 Hun, 329; 5 T. & C., 475.)

This action was brought to recover damages for injuries sustained by plaintiff in consequence of being kicked off of one of defendant's baggage cars by the baggageman.

The transaction resulting in the injury occurred at Norwich, May 3, 1872. The defendant operated a broad-gauge railroad from Binghamton to Norwich and a narrow-gauge road from Norwich to Utica. The passenger train from Binghamton on this occasion as usual ran to the depot at Norwich and transferred the passengers and freight to the Utica train and then backed south on a switch, a distance of about sixty rods, to the round-house to make up the new train which was to run back to Binghamton. The train consisted of the engine, an express car, a baggage and smoking car, one car divided into two compartments and one passenger car. The conductor of the train got off with the passengers at the depot and left it in charge of the baggageman to run back on the switch and make up the new train. While the train was unloading and transferring the passengers at the depot the plaintiff, a boy twelve years old, living near the depot,

[1] The Reporter's statement of facts is somewhat abbreviated, and his notes of the arguments of counsel are omitted.

got on the platform of the baggage and smoking car, at the rear end, to ride down to the round-house. A quantity of wood was piled at one point along near the west side of the track for a distance of over 100 feet. While the train was backing down the track, and when it arrived at the wood pile, the baggageman in charge of the train discovered the plaintiff on the platform and ordered him off. According to the plaintiff's testimony, he replied: "I can't, the wood is right here; I want you to help me," and thereupon the baggageman kicked him off. He fell against the wood and rolled under the car, the wheel of which passed over and crushed his leg. A printed notice was posted up in the baggage car and another one near where the plaintiff was standing on the platform, as follows: "No person will be allowed to ride on this baggage car except the regular train men employed thereon. Conductor and baggagemen must see this order strictly enforced." Another printed notice was contained in the posted time cards as follows: "Train baggagemen must not permit any person to ride in the baggage car, except the conductor and news agent connected with the train. Conductor and baggageman will be held alike accountable for a rigid enforcement of this rule."

The Court charged the jury, among other things, that the plaintiff was a trespasser on the car, but if the baggageman, nevertheless, in the discharge of his duty, pushed him off the train in an improper manner and at a dangerous place the defendant was liable; to which the defendant excepted. The Court also charged the jury that if the baggageman pushed the boy off the train, and in doing so was acting as the employee of the defendant in good faith in the discharge of a duty he owed the company, the defendant would be liable for the careless and negligent discharge of his duty; but if he was acting wilfully and maliciously toward the plaintiff, outside of and in excess of his duty, then the baggageman alone would be responsible in law for the consequences; to which the defendant ex-

cepted and requested the Court to modify the charge or to charge that defendant was not liable if the baggageman acted wilfully and wantonly without authority from defendant. This the Court refused.

ANDREWS, J.: There is, at this time, but little conflict of judicial opinion in respect to the general rule by which the liability of a master for the misconduct of his servant, resulting in injury to third persons, is to be tested and ascertained. In *Higgins* v. *The Watervliet Turnpike Company* (46 N. Y., 23) this subject was considered by this court, and the rule was declared to be, that the master was responsible *civiliter* for the wrongful act of the servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been

held liable for the negligent or tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master.

It is, in general, sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. But it is said that the master is not responsible for the wilful act of the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility.

The case of *McManus* v. *Crickett* (1 East, 106) turned upon the form of the action and the distinction between trespass and case, but Lord Kenyon, in pronouncing the judgment of the court, said: "Where a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." This language was cited with approval in *Wright* v. *Wilcox* (19 Wend., 343), and the master was held not to be responsible where the servant, in driving his master's wagon along the highway, wilfully whipped up his horses

while the plaintiff's son, a young lad, was standing between the front and back wheels, attempting, with the implied permission of the servant, to get into the wagon, in consequence of which the boy was thrown down, run over and injured. The servant was cautioned by a bystander that if he did not stop he would kill the boy. The Court, in the opinion delivered, assumed that the evidence showed that the servant whipped up the horses with a wilful design to throw the boy off. The act of the servant was imminently dangerous, and it might reasonably be inferred from the evidence that he designed the injury which resulted from it. "The law," said Cowen, J., "holds such a wilful act a departure from the master's business." So in *Vanderbilt* v. *The Richmond Turnpike Company* (2 Comst., 479), the master of the defendant's boat intentionally ran into the boat of the plaintiff, and the Court held that this was a wilful trespass of the master for which the defendant was not liable. In *Lyons* v. *Martin* (8 Ad. & El., 512) it was held that where a servant merely authorized to distrain cattle damage-feasant, drives cattle from the highway into his master's close, and there distrains them, the master is not liable. In *Mali* v. *Lord* (39 N. Y., 381) the act complained of was an illegal imprisonment of the plaintiff by the servant of the defendant, and the Court held that the authority to do the act could not be implied from the general employment of the servant. The imprisonment, assuming that the suspicion upon which it was made was well founded, was illegal. The master could not lawfully have detained the defendant if he had been present, and the Court were of the opinion that the servant could not be said to be engaged in his master's business when he assumed to do what his master could not have done himself. (See, also, *Bolingbroke* v. *The Local Board, etc.*, L. R., 9 C. P., 575.) It is quite useless to attempt to reconcile all the cases. The discrepancy between them arises not so much from a difference of opinion as to

the rule of law on the subject as from its application to the facts of a given case.

It seems to be clear enough from the cases in this State that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. In this view, the judge at the trial correctly refused to qualify his charge or to charge that it was sufficient to exempt the defendant from liability that the act of the brakeman in putting the plaintiff off the

car was wilful. He had already charged that if the brakeman acted "wilfully and maliciously towards the plaintiff, outside of and in excess of his duty," in putting him off of the car, the defendant was not liable. If the counsel intended to claim that the defendant was exempt from responsibility if the brakeman acted wilfully, although without malice, the point was not well taken. That the brakeman designed to put the plaintiff off the car was not disputed, and this was consistent with the authority and duty entrusted to him. But a wilful act which will exempt a master from liability for the tort of his servant, must be done outside of his duty and his master's business. The charge was, therefore, strictly correct, and the exception was not well taken.

Neither was the defendant entitled to have the Court rule, as matter of law, that, upon the circumstances as shown by the evidence on the part of the plaintiff, the defendant was not responsible. It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. The plaintiff had no right to be there. He was not a passenger or servant, and had no express or implied permission to be upon the car. The brakeman, in kicking the boy from the platform, acted violently and unreasonably, and to do this while the car was in motion, and when the space between it and the wood-pile was so small, was dangerous in the extreme. But the Court could not say from the evidence that the brakeman was acting outside of and without regard to his employment, or designed to do the injury which resulted, or that the act was wilful within the rule we have stated. If the master, when suit for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption upon the ground that the servant was in fact, pursuing his own purposes, without reference to his master's business, and was acting maliciously and wilfully, it must, ordinarily, be left to the jury to determine this issue upon a

consideration of all the facts and circumstances proved. (See *Jackson* v. *The Second Ave. R. R. Co.*, 47 N. Y., 274.) There may be cases where this rule does not apply, and where the Court would be justified in taking the case from the jury; but where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury. The fact that the plaintiff was a trespasser on the cars is not a defence. The lad did not forfeit his life, or subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the brakeman by which his life was put in peril, and which resulted in his losing his limb. (*Sanford* v. *Eighth Ave. R. R. Co.*, 23 N. Y., 343; *Lovett* v. *Salem, etc., R. R. Co.*, 9 Allen, 557; *Holmes* v. Wakefield, 12 id., 580.)

No error of law was committed on the trial, and the judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.[2]

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[2] Hoffman *v.* The New York Central R. R. Co., 87 N. Y. 25, 1881. (It is contrary to the Statute law of the state to put off a trespasser from a moving train. B was a brakeman on a passenger train of a railroad company. C, a small boy of eight, was stealing a ride on the platform of the car. B kicked C off the train when it was in motion, and C was injured. C sued the company and recovered judgment. Affirmed on the ground that from his position B might be presumed to have the power to remove passengers, and that his act, though wilful and unlawful, was within the scope of his employment.)

Illinois Central R. R. Co. v. *Latham*, 72 Miss. 32, 1894. (The rules of a railroad company made it the duty of a brakeman to report persons refusing to pay their fare and to act only under the conductor's orders in ejecting those who so refused. C was a brakeman in the employ of the company. B was stealing a ride on a train. C for his own use demanded a sum less than the fare, and on B's refusal to pay, kicked him off the train and injured him. B brought an action against the

company. *Held*, that on the facts the Court should have given binding instructions for the defendant.)

Compare the following cases in which the master was held liable for the wilful and wanton injury of a third person by the misuse by the servant of an instrument intrusted to his care by the master.

Toledo, Wabash & Western R. R. Co. *v.* Harmon, 47 Ill. 298, 1868. (A was injured by the running away of his team, caused by the escape of steam from an engine belonging to the company. The engineer in charge of the locomotive had caused the steam to escape. In an action by A against the company, the defendants asked the Court to charge that if the jury believed the injury to have been caused by the wilful and malicious act of the agent of the defendants, they must find for the defendants. The Court refused the instruction. Verdict for the plaintiff. Judgment affirmed. Walker, J.: "He was their servant, was engaged in the performance of the duty assigned to him, and if, while so engaged, he used the engine put into his possession and under his control, to accomplish the wanton or wilful act complained of, why should not the company be held liable?" p. 306. *Accord*: Texas & P. Ry. Co. *v.* Scoville, 62 Fed. 730, 1894, on identical facts.)

SECTION 3.—LIABILITY FOR NONFEASANCE NEGLIGENCE OF SERVANTS.

JOEL *v.* MORISON.

In the Court of Exchequer, 1834.

6 *Carrington and Payne's Reports*, 501.

The declaration stated, that, on the 18th of April, 1833, the plaintiff was proceeding on foot across a certain public and common highway, and that the defendant was possessed of a cart and horse, which were under the care, government, and direction of a servant of his, who was driving the same along the said highway, and that the defendant by his said servant so carelessly, negligently, and improperly drove, governed, and directed the said horse and cart, that, by the carelessness, negligence, and improper conduct of the defendant by his servant, the cart and horse were driven against the plaintiff, and struck him, whereby he was thrown down and the bone of one of his legs was fractured, and he was ill in consequence, and prevented from transacting his business, and obliged to incur a great expense in and about the setting the said bone, &c., and a further great expense in retaining and employing divers persons to superintend and look after his business for six calendar months. Plea—Not guilty.

From the evidence on the part of the plaintiff it appeared that he was in Bishopsgate street, when he was knocked down by a cart and horse coming in the direction from Shoreditch, which were sworn to have been driven at the time by a person who was the servant of the defendant, another of his servants being in the cart with him. The injury was a fracture of the fibula.

On the part of the defendant witnesses were called, who swore that his cart was for weeks before and after the time sworn to by the plaintiff's witnesses only in the habit of being driven between Burton Crescent Mews and Finchley, and did not go into the City at all.

Thesiger, for the plaintiff, in reply, suggested that either the defendant's servants might in coming from Finchley have gone out of their way for their own purposes, or might have taken the cart at a time when it was not wanted for the purpose of business, and have gone to pay a visit to some friend. He was observing that, under these circumstances, the defendant was liable for the acts of his servants.

PARKE, B.—He is not liable if, as you suggest, these young men took the cart without leave; he is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable.

His Lordship afterwards, in summing up said—This is an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. There is no doubt that the plaintiff has suffered the injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no doubt also that the master, if that person was driving the cart on his master's business, is responsible. If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on

his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. As to the damages, the master is not guilty of any offence, he is only responsible in law, therefore the amount should be reasonable.

Verdict for plaintiff—damages, 30*l.*[1]

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[1] *Compare*: Sleath *v.* Wilson, 9 C. & P. 607, 1839. (B directed his servant C to drive to the "Red Lion," in Castle-street, Leicester-square, but the servant improperly drove to Old-street Road, four miles out of his way, to deliver a parcel of his own, and negligently drove over A in Old-street Road. A brought an action against B. Erskine, J., in summing up, said that the action might be maintained. He left the case to the jury, who found for the plaintiff.)

Stone *v.* Hills, 45 Conn. 44, 1877. (B *et al.* sent their servant D with a team to C at Y, telling D to return by a particular route. C told D to go on with team to X and then return to him, C. D did so, and while at X left the horses unhitched. The horses ran away and injured A, for which injury A sued B. Judgment for A reversed on appeal.)

Quinn *v.* Power, 87 N. Y. 535, 1882. (B directed the pilot of his, B's, ferry boat to take the boat from X to Y. The pilot agreed, without compensation, with a boatman on the shore to put the boatman on a passing tow. To do this the ferry deviated from its usual course and while so doing negligently ran into another boat. In the collision C was thrown into the river and drowned. An action for damages for C's death was brought by A, his, C's, representative. The trial court directed a verdict for B; on appeal a new trial was granted, on the ground that the facts as disclosed made the master responsible for the negligence of the pilot. Finch, J.: "Even if the motive [of the deviation] was some purpose of their own, they were still about their usual employment. * * * They were still engaged in their master's business of transporting freight and passengers across the river." p. 539.)

Ritchie *v.* Waller, 63 Conn. 155, 1893. (B directed his servant C to drive to X and procure a load of manure and return with it. C drove to X, procured the manure, and, instead of going directly home, drove out of his way to stop at a shoemaker's to get his own boots mended. C left the team unhitched and unattended while he went into the shoemaker's. The team started and the wagon came in contact with A's wagon, injuring A. A brought an action against B, which was tried without a jury. Judgment for A affirmed. Torrance, J.: "In cases where the deviation is slight and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So to, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions," pp. 161, 162. The Court thought that the facts as stated warranted the trial Court holding as a question of law that the servant, at the time of the injury, was still executing his master's orders.)

MITCHELL *v.* CRASSWELLER.

In the Court of Common Pleas, 1853.

13 Common Bench Reports, 237.

This was an action by husband and wife, to recover a compensation in damages for injuries sustained by them through the alleged negligent driving of the defendants' servant.

The cause was tried before Jervis, C. J., at the sittings at Westminster after the last term. The facts appeared to be as follows:—The defendants are ironmongers carrying on an extensive business in Welbeck Street, and were possessed of a horse and cart, with which their carman had on the day mentioned in the declaration been out to deliver goods. Returning home at a late hour in the evening, the carman drove up to the shop door to get the keys of the stable, for the purpose of putting up the horse and cart. Having got the keys, the carman was about to proceed to the stable, which was in an adjoining street, and within five hundred yards of the shop, when the defendants' foreman, who was unwell, asked him to drive him a part of his way home; whereupon the carman went to the house for the purpose of asking the permission of one of his employers, but, not finding either of them at home, returned to the foreman, and, observing that "he would chance it," he drove him as far as Euston Square. In returning thence to the stable, he accidentally ran over the plaintiffs.

Upon this state of facts, it was contended on the part of the defendants that they were not responsible, the accident having happened whilst the carman was doing something out of the scope of his duty.

His lordship directed the jury to find for the plaintiffs, telling them at the same time to assess the damages

they considered the plaintiffs entitled to. The jury accordingly assessed the damages at 30*l.* for the injury done to the plaintiff, Thomas Mitchell, and at 10*l.* for the injury to his wife. And leave was reserved to the plaintiffs to move to enter the verdict for them, if the Court should think that the defendants were under the circumstances responsible for the negligence of their carman.[1]

JERVIS, C. J. * * * * * * *[2]

That brings us to the principal point, whether, under the circumstances disclosed by the evidence, the defendants are responsible for the injury which the plaintiffs have sustained. Each case must depend upon its own particular circumstances. No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him. But, here it cannot be denied, that, though it was the duty of the carman, on his arrival with the horse and cart at Welbeck Street, immediately to take them to the stable, he, in violation of that duty, and without the sanction or knowledge of his employers, instead of going to the stable, started on a new journey, wholly unconnected with his masters' business,—as my Brother Parke expresses it in *Joel* v. *Morrison,* "on a frolic of his own." I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance. I think that was not the case here, and therefore I think the defendants are not liable to this action.[3]

Rule discharged.

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[1] The Reporter's statement of facts is abbreviated, and his notes of the arguments of counsel omitted.

[2] Only so much of the opinion as relates to the question of a master's responsibility for the acts of his servant is printed.

[3] The concurring opinions of Maule, Cresswell, and Williams, JJ., are omitted.

RAILWAY *v.* SHIELDS.

In the Supreme Court of Ohio, 1890.

47 Ohio State Reports, 387.

Error to the Circuit Court of Preble County.[1]

Minshall, C. J.: The suit below was an action by Shields, a small boy, prosecuted by his next friend, against The Pittsburgh, Cincinnati & St. Louis Railway Company for an injury caused by the explosion of a torpedo, wantonly and negligently left on its track by one of its servants, at a point where the children and inhabitants living along the line of the track, were daily in the habit of passing with the knowledge and acquiescence of the company. The torpedo, a dangerous instrument, used by the company as a signal in the operation of its road, was picked up by a companion of the plaintiff, carried some distance away and caused to explode by one of them hitting it. They were ignorant of its character, and at the time, trying to satisfy their curiosity about it. The same accident caused the injury for which the original action in *Harriman* v. *Railroad Company,* 45 Ohio St. 11, was brought, the judgment in which was reversed by this Court, for error in sustaining a demurrer to the petition; and the petition in the Harriman case is substantially the same as in this case.

After the decision in the Harriman case, the defendant below filed an answer in this case, the second defence, of which and to which a demurrer was sustained, is as follows:

"The defendant, for its second defence, says, that it carries upon its trains signal torpedoes to be used in addition to its regular signals, when, from fog or other cause, the other signals cannot be seen or relied upon, and that if said torpedo was placed upon the track as alleged in said

[1] The Reporter's notes of the argument of counsel are omitted.

amended petition, by the employees of this defendant (a fact which defendant wholly denies), that then said employees placed the same upon the track, at a time and place in broad daylight, when and where there was no necessity for the use thereof, or of any signals of any kind whatsoever, and that said use was without the knowledge or consent or authority, express or implied, of the defendant; was against and contrary to its rules and regulations, as said employees well knew, and that said torpedo was so used by them outside and beyond the scope of their employment, and in no wise connected with the control, management or operation of said train of cars or railroad, and was so placed for the accomplishment of an independent and wrongful purpose of their own, in this, to wit: that said employees, or one of them, while said train was taking water at said water-tank, for the purpose of having sport with some lady passengers who were upon said train, took torpedoes from the place where kept on said train, and without the knowledge of said lady passengers, with whom said employees were well acquainted, placed the same upon the iron rails of the track, in front of the wheels of the caboose in which said lady passengers were riding, with the intention to frighten them by the sudden and unexpected explosion of said torpedoes, which would result with a loud noise by the passage of the caboose over them; when said train started forward, one of said torpedoes failed to explode, and was found as stated in said amended petition."

The sustaining of the demurrer to this defence is assigned for error. There is also an exception to the ruling of the court in refusing to charge as requested. But this ruling need not be noticed, as it presents simply the same question as is presented by the demurrer to the answer.

It would seem that the question raised by this defence, was presented by the demurrer to the petition in the Harriman case, and determined by the decision of this court therein. The fourth proposition of the syllabus being, in

substance, that the railroad company was liable for the negligence of its servant, in placing and *leaving* the torpedoes on its track at a point where the public, including children, were permitted to pass, "notwithstanding such negligent acts of the servant were wanton, reckless and needless."

But the counsel for the plaintiff in error *think* that it was not, and claim that there is clear error in the case for the reason, that the act of the conductor in placing the torpedoes on the track, was a mere caprice of his own, outside of his employment as a servant, and contrary to the rules of the company; and that, therefore, the company is not liable.

We do not adopt this view, and shall show that the negligence of the conductor in this regard, though wanton and contrary to the rules of the company, occurred within his employment, and is, therefore, imputable to the company.

The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care. 1 Hilliard on Torts, 3 ed., 127. "Sometimes," says Pollock, "the term 'consummate care' is used to describe the amount of caution required, but" he says, "it is doubtful whether even this is strong enough. At least, we do not know any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him." Pollock on Torts, 407. See also, Wharton on Negligence, Sec. 851.

And, it stands to reason, that one charged with a duty of this kind cannot devolve it upon another, so as to exonerate himself from the consequences of injury being caused to others by the negligent manner in which the duty in regard to the custody of such an instrument may be performed. Speaking of the absolute duty imposed by statute in certain cases, and, also, of the duties required by common law "of common carriers, of owners of dangerous animals or other things involving, by their nature or position,

special risk or harm to neighbors," Pollock observes, "the question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor,' but whether the duty has been adequately performed or not." Pollock on Torts, 64.

We in no way limit, nor question the soundness of the general rule, which exonerates the master from liability for the acts of his servant done outside of his employment. What has been stated is strictly within the reason and principle of the rule, which is, that whatever the servant is entrusted by the master to do for him, must be done with the same care and prudence that would be required of the master, acting in that regard for himself; if it be the custody of dangerous instruments, he must observe the utmost care.

The inability of the master to shift the responsibility connected with the custody of dangerous instruments, employed in his business, from himself to his servants entrusted with their use, is analogous to, and may be said to rest upon the same principle, as that which disenables him from shifting to an independent contractor, liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded. It seems by the great weight of authority and reason that this cannot be done. See *Railroad Company* v. *Morey,* 47 Ohio St. 207, and cases there cited. Also, see, *Lawrence* v. *Shipman,* 39 Conn. 586, 589; and Cooley on Torts, 2d ed., 644, 646.

And the relation of master and servant and that of employer and independent contractor, are, in this regard, treated in one view by Pollock in his work on Torts, as will appear from consulting his work at page 64.

Now, in this case, it must be observed, that the duty entrusted by the railway company to the conductor in regard to these torpedoes was, not only to *use* them as signals with the requisite care and caution, but to observe like care and caution in the *custody* of them, when not in use. The servant's custody of them, when not in use, was as much a

part of his employment, as was the use of them as signals when required. In taking them from the place where they were carried when not in use, and, in mere caprice, placing them on the track for the purpose of frightening the ladies, he was not, it is true, within his employment as to the use of them; but, in so doing, he violated the duties connected with his employment as the custodian of them, and thereby made his master liable for the consequences of his neglect, in the same manner, and to the same extent, as if it had been done by the company itself.

It is necessary in this, and in all similar cases, to distinguish between the departure of a servant from the employment of the master, and his departure from, or neglect of, a duty connected with that employment. A servant may depart from his employment without making his master liable for his negligence when outside the employment of the master; and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. But he cannot depart from the duty entrusted to him, when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty entrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master; otherwise the duty required of the master in respect to the custody of such instruments employed in his business, may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of a neglect of the duty.

To better illustrate the ground of this distinction, we may, for example, suppose a servant, with others under his control, employed with a construction train repairing the track of his master. He may, for a time, quit his employment, and, with his men, go off on affairs of his own. Whilst thus out of the master's employment, he may build a

fire, which, through his negligence, may consume the property of another; and, in the meantime, loss of life and property may result from a collision with the train negligently left standing on the track. Now whilst, as has been held, the master would not be liable for the loss resulting from the fire, because the act was done outside the servant's employment (*Morier* v. *Railway Company,* 31 Minn. 351), yet it is equally certain that, for the loss occasioned by the servant's negligence in leaving the train on the track, the master would be liable in damages; for the plain reason that, in abandoning the custody of the train, he was guilty of negligence in the employment of the master, whilst, in building the fire, he was not.

That what was done by the conductor contravened the purpose and instructions of the company, in regard to the use of these torpedoes, does not vary its liability for the negligence of the conductor in the custody of them. In discussing the master's liability for his servant, it is said by Professor Wharton, "It is not necessary, in order to make the master liable, that there should be specific directions as to the particular act. It is enough if the general relation of master and servant, within the range of such act, exists. The question is simply whether the wrong inflicted was incidental to the discharge of the servant's functions. It may have been capricious. It may have contravened the master's purposes or directions. But a master who puts in action a train of servants, subject to all the ordinary defects of human nature, can no more escape liability for injury caused by such defects, than can a master, who puts machinery in motion, escape liability, on the ground of good intentions, for injury accruing from defects of machinery. *Out* of the servant's orbit, when he ceases to be a servant, his negligences are not imputable to the master. But within that orbit, they are so imputable, whatever the master may have meant." Wharton on Negligence, Sec. 160; see, also, Wood on Master and Servant, Sec. 283; and Cooley on Torts, 632 (539*).

The custody of these torpedoes was within the servant's orbit. Negligently leaving them on the track was a negligence within that orbit, and therefore imputable to the master. If a master has a duty to perform and intrusts it to a servant, who disregards it to the injury of another, it is immaterial, so far as the liability of the master is concerned, with what motive or for what purpose, the servant neglects the duty. This is illustrated by the case of *Wood* v. *Railroad Company*, 17 N. Y. 362, which was an action against the company for failure to carry the plaintiff to her destination with reasonable dispatch. The delay was caused by the wilful act of the conductor in wrongfully detaining the train at a station; and which the defendant claimed exonerated it from liability. But the Court held otherwise; it being observed, among other things, in the opinion, that "The obligation to be performed was that of the master, and delay in performance, from intentional violation of duty by an agent, is the negligence of the master."

We do not see that this, in any way, conflicts with the decision in *Railroad Company* v. *Wetmore*, 19 Ohio St. 110. There the plaintiff got into a quarrel with the baggage-master of the company about checking his baggage; and, under the influence of anger, the latter struck the plaintiff with a hatchet, and it was held that the company was not liable for the injury. A hatchet is not an instrument of danger, within the rule above stated—it includes only such instruments as are such within themselves. The danger of a hatchet is in the hand and spirit of the man who may use it. If, in this case, the instrument left on the track had been a hatchet, the company would not have been liable to a child who might afterwards have picked it up and been injured by it. For the company would have been under no such duty as to its custody, as it was under in regard to this dangerous explosive.

Judgment affirmed.[2]

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[2] *Compare:* Cousins *v.* Hannibal & St. Joseph R. R. Co., 66 Mo. 572,

1877. E and F were servants of railroad. E had charge of a round house; F's duty was to run the engines from round house to the yard. G, another employee of the railroad, was taken sick with cholera. To obtain a doctor E and F, E acting as engineer and F as fireman, ran an engine down the track outside the yard, and in so doing negligently ran over A's cattle. *Held*, in an action by A against the company, that the company was not liable.)

Salisbury *v.* Erie R. R. Co., 66 N. J. L. 233, 1901. (A railroad company placed a push car in the hands of a foreman of a gang of men for the purpose of burning waste railroad ties. The foreman loaned it to C to take away the ties for his, C's, own use. C in pushing the car on the tracks of the company negligently injured A. *Held*, that the company was responsible for the injury to A, on the ground that it was the duty of the foreman to keep the car under his own supervision while on the track).

SECTION 4.—LIABILITY FOR NONFEASANCE, CONTINUED—WHAT CONSTITUTES THE RELATION OF MASTER AND SERVANT.

LAUGHER *v.* POINTER.

IN THE COURT OF KING'S BENCH, 1826.

5 *Barnewall and Cresswell's Reports*, 547.

Case. The first count of the declaration alleged that the plaintiff was possessed of a horse, and defendant was possessed of a carriage, and two horses harnessed to and drawing the same, and which carriage and horses were under the care, government, and direction of a person, *being the servant of the defendant* in that behalf, who was driving the same, yet that the defendant, by his said servant, so negligently and improperly drove and directed his said carriage and horses that by the negligence and improper conduct of the defendant, by his said servant, the carriage ran and struck against the plaintiff's horse, &c. The second count differed from the first, only, by omitting to state that the defendant was possessed of the horses. The third and last count alleged that the defendant was possessed of a carriage drawn by two horses under the care, government, and direction of the defendant, yet that the defendant so negligently and improperly drove, governed, and directed the carriage and horses that, by the negligence and improper conduct of the defendant, the carriage ran and struck against the plaintiff's horse, &c. At the trial before Abbott, C. J., at the London sittings after Michaelmas term, 1823, it appeared in evidence that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the usual way to a

stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent the pair of horses and a person to drive the same. The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose. The driver had no wages from his master, but depended upon receiving a gratuity from the persons whose carriages he drove; the defendant gave him 5*s.* as a gratuity for his day's work, but the driver had no power to demand anything. The Lord Chief Justice thought that the evidence did not support the declaration, and directed a non-suit. A rule *nisi* for a new trial was afterwards granted, and upon the argument, there being a difference of opinion on the bench, the case was directed to be argued before the twelve judges, all of whom (except the Lord Chief Baron) met for that purpose in Serjeant's Inn Hall, on the 2d of February, 1825.[1]

LITTLEDALE, J. * * * * * *[2]

According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence; and he is also answerable for acts done by the negligence of those whom the law denominates *his* servants, because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant.

For the acts of a man's own domestic servants there is no doubt but the law makes him responsible, and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master either personally or by those who are entrusted by the master with the hiring of servants,

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[1] The Reporter's notes of the arguments of counsel are omitted.

[2] His restatement of the facts of the case is omitted.

and he is therefore selected by the master to do the business required of him.

This rule applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself or by a person specially deputed by him, if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under workmen, and he pays them on behalf of the owner. These under workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer. This, however, is not the case of a man employing his own immediate servants, either domestic servants, or others, engaged by him to conduct any business, or employment, or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to

employ him. This coachman was not hired to the defendant; he had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they are not the less the servants of the innkeeper; they are not servants upon wages, but servants upon expectation of gratuities. And, therefore, if the defendant is in this case to be answerable for the acts of the driver provided by the jobman, it must be upon this principle, that if a man either for his benefit or pleasure employs an agent to conduct any business, such agent is to be looked upon in the same light as if he was the immediate servant of the employer, and that the owner of the property by employing such an agent to transact his business, confides to him the choice of the under workmen, and then the principle must go on to this, that such agent and under workmen are to be considered in the same light as the foreman or manager of a person in conducting his business, and as the workmen selected by such foreman or manager; and that it makes no difference to persons who receive an injury in what light the offending party stands to the principal, whether as an under workman employed by an agent, or an under workman employed by the foreman of the principal. And that the only thing to be looked to is, whether in the end the principal pays for the employment in the course of which the injury is occasioned.

But I think that, upon principle, this rule cannot be carried so far. In *Bush* v. *Steinman* [1 Bos. & Pul. 407], indeed, Mr. Justice Heath expresses it as his opinion, that if a person hires a coach upon a job, and a job coachman is sent with it and does any injury, the hirer of the carriage

is answerable. That is certainly entitled to great weight, as being the opinion of a very able judge. It was, however, only an *obiter dictum,* and in a case where, like the present, there is a difference of opinion amongst the judges, the question must, if possible, be determined upon principle and decided cases. If a man charters a ship for a voyage or for time, and the master and mariners are appointed by the owner, this ship is employed for the benefit and for transacting the business of the charterer, just the same as if he had a ship of his own employed in the same service, and it might be said that he deputes to the owner the selection of the master and mariners; but in such a case the law has never considered the charterer liable to third persons for the negligence of the master and mariners. In *Fletcher* v. *Braddick* [2 N. R. 182], the owners had chartered the vessel to the commissioners of the navy, who were to put an officer on board, under whose direction the master was to act, and though there was a king's pilot on board, yet the owners were nevertheless held liable for running down the plaintiff's ship. In *Nicholson* v. *Mounsey* [15 East, 384], a captain of a man-of-war was held not liable for the default of the lieutenant whose watch it was when an injury was committed. Suppose a man has a ship or a carriage or other thing to repair, and he, instead of having the repairs done on his own premises and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed; these are employed by a person who may be considered the agent of the principal, and yet the law would not hold the principal liable. If a man hires a carriage and horses to travel from stage to stage, the carriage and horses are employed for the benefit or pleasure of the traveller, instead of using his own, which he may not do either from inability to keep horses or a desire of expedition, and yet the law has never considered the traveller liable. There is no difference in principle

between a man's travelling by the stage or travelling by the day. In one case and the other the traveller is using the carriage and horses for his benefit; he pays so much by the day instead of so much by the mile; he pays the coachman a gratuity in one case, and the postilion in the other case, and yet the traveller has never been held liable. As to this latter point, there are some decisions in point. *Sammell* v. *Wright* [5 Esp. 263], where the horses were hired to go to Windsor, and the owner of the horses was held liable, because they were under the care and direction of his servants. The carriage belonged to the traveller, who was the Marchioness of Bath. The case of *Dean* v. *Branthwaite* [5 Esp. 35], arose on a dispute between the owner of the carriage and the owner of the horses, which were hired to go to Epsom. Lord Ellenborough says, a person who hires horses under such circumstances has not the entire management and power over them, but that they continue under the controul and power of the stable-keeper's servants who were entrusted with the driving; and that he would be answerable for any accident occasioned by the post boy's misconduct on the road, and then he mentions a case which had occurred of that kind. In this case, also, the party travelling had his own carriage. The same rule would apply to a hackney coach; a man, instead of hiring his own carriage and servants, employs a hackneyman to drive him; there it is for the profit or convenience of the person riding in the coach, and yet the person so riding is not liable.

The cases referred to before Lord Ellenborough only shew, indeed, the owner of the horses to be liable, but it may be said the traveller is liable also. I think not. The coachman or postilion cannot be the servant of both. He is the servant of one *or* the other, but not the servant of one *and* the other; the law does not recognize a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you cannot have two separately liable; you must bring your action either against

the principal, or the person who commits the injury, *Stone* v. *Cartwright* [6 T. R. 411]. There it was held that an action for an injury sustained through the improper working of a mine, must be brought against the owner of the mine, or against the workmen who did the injury, but that it could not be brought against an agent who hired the workmen. The allowing two principals to be severally liable would tend to a multiplicity of actions, because if the traveller was liable, he might have an action against the stable-keeper for supplying improper drivers and horses, and then the stable-keeper might have an action against his own drivers. If, indeed, several persons are concerned in a trespass, or other tortious act, they are liable jointly or severally, at the election of the party injured, but the several liability arises from the joint liability, and from the rule of law that a party injured need not sue all who are guilty of the wrongful act; but what I say is, that two persons cannot be made separately liable at the election of the party suing, unless in cases where they would be jointly liable: and there cannot be any ground for saying that the hirer of the horses and the jobman would be jointly liable. There are, however, cases which have been determined upon principles not altogether consonant to what I have before considered are those upon which the liabilities of parties should be determined, where persons have been held liable for the negligence of individuals who were not their own immediate servants, but the servants of agents whom they had employed to do their work. In *Bush* v. *Steinman* [1 Bos. & Pul. 404], the owner of a house had employed a surveyor to do some work upon it: there were several subcontracts, and one of the workmen of the person last employed put some lime on the road, in consequence of which the carriage of the plaintiff was overturned; and it was held that the owner of the house was liable, though the person who occasioned the injury was not his own immediate servant. So in *Sly* v. *Edgley* [6 Esp. 6], a person had employed a bricklayer to make a sewer, who left it open;

in consequence of which the plaintiff fell in, and broke his leg. The person who employed the bricklayer was held liable, upon the principle of *respondeat superior,* that he had employed the bricklayer, and was answerable for what he had done. These cases appear to establish that in these particular instances the owner of the property was held liable, though the injury were occasioned by the negligence of contractors or their servants, and not by the immediate servants of the owner.

But supposing these cases to be rightly decided, there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. But as to *Bush* v. *Steinman* [1 Bos. & Pul. 404], there are some observations to be made. Lord Chief Justice Eyre, in the first place at *nisi prius,* was of opinion the action was not maintainable; and when the case came before the Court, he says in the beginning of his judgment, "that he finds great difficulty in stating with accuracy the grounds on which it is to be supported. The relation of master and servant as commonly exemplified in actions brought against the master is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." And in the conclusion he also says, that he still feels difficulty in stating the precise prin-

ciple on which the action is founded. This case, therefore, does not rest upon the same basis as it would if no such doubt had been expressed. The case is mainly grounded upon that of *Littledale* v. *Lord Lonsdale;* but in that case the defendant had a foreman or steward paid by him, and he engaged all the under workmen, who were paid out of the funds of the defendant. All the machinery and utensils belonged to the defendant, and all the persons employed were his own immediate servants, just as much as his domestic servants engaged and hired by his house steward. There is the case of *Leslie* v. *Pounds* [4 Taunt. 649], which has some resemblance to the last cases. Lord Chief Justice Mansfield says that it is a very singular case. The tenant of a house was bound to repair it, but the landlord superintended the repairs; and, on being remonstrated with by the commissioners of pavement as to the dangerous state of the cellar, had promised to take care of it, and had put up some temporary boards as a protection to the public, but they proved insufficient; and an accident having happened, he was held liable. That was decided on the ground of the defendant's personal interference about his own property. It may be said that the defendant in the present case was owner of the carriage, and that therefore the principles of these latter cases apply; but, admitting these cases, the same principle does not apply to personal movable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and directions of persons exercising public employments, and the mere possession of that, where the care and direction of it is entrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner lia-

ble. Movable property is sent out into the world by the owner to be conducted by other persons: the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it. And in the instances of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons, who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. And I think that there cannot be any difference, in point of law, as to the liabilities of these persons arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do if it had been sent to be repaired by a coachmaker who, in the course of repair, had occasioned any damage to other persons; but if the injury arises from the driver, it is he, or the person who appoints him, that is to be responsible. It may be said that, according to this doctrine, a person who hired job horses and a coachman for a year would not be answerable for the negligence of the coachman: if the coachman remain the mere servant of the jobman, not otherwise employed in the service of the hirer, I think the hirer would not be liable for whatever time he hired the coachman and horses; but where the coachman is hired for a year, it will very often happen that he is employed in other services besides the mere attention to the coach and horses; and if, by such circumstances, he becomes the servant of the hirer, besides being the servant of the jobman, the case might then admit of a different consideration. In *Chilcot* v. *Bromley* [12 Ves. 114], testator bequeathed to all his servants 500*l.* each; and it was held, that a coachman supplied by a jobmaster, together with a carriage and horses which were hired by the year, was not entitled to be considered a servant.

This, however, is not the case of a servant employed

for a year or a month, and upon the whole of the circumstances of this case, I am of opinion that this defendant is not liable for the damage that has occurred, and that the rule for setting aside the non-suit should be discharged.

There are many cases where questions have arisen upon the liabilities of postmasters, of captains of ships of war, and of owners of ships who have taken pilots, and of factors who have acted for their principals, and others, as to what degree of possession is kept by the owner. These I have not thought it necessary to notice, because I think the sole question here is, whether if a man employs another to do work respecting personal movable property, and that other furnishes a servant, that servant is to be considered in the same light as a servant appointed by the person himself.

HOLROYD, *J.* * * * * * * *[3]

It was contended in the argument, not only that the defendant was not responsible for the driver, but that the plaintiff could not recover on this declaration, each count of which contained as a material allegation that the act was done by the defendant's servant, whereas the driver could not be considered as his servant. But my mind has come to the conclusion, that the defendant is responsible for the driver's negligence, and responsible too upon this declaration, the driver being to be considered, in my opinion, for this purpose as, in law, his servant. It appears to me, that the defendant stands in the same situation of responsibility as if the horses had been driven by Bryant himself, or as if they had been driven by a person chosen by the defendant himself, for the driving is equally under the authority and orders of the defendant, and equally for his profit, benefit, or pleasure, and the driver is, I think, equally the defendant's servant for that purpose, whether the driver be Bryant himself, the person directly hired and employed by the defendant, or be another person selected and ap-

[3] His restatement of the facts is omitted.

pointed by the defendant himself, or a person selected and appointed by Bryant under the authority or permission of the defendant. The question is not whether Bryant, as the owner of the horses and the immediate master of the driver, might or might not have been made responsible for the driver's negligence, nor is this the case of a letting for a particular purpose only, such as going to a particular place, as in *Dean* v. *Branthwaite* [5 Esp. 35], and *Sammell* v. *Wright* [5 Esp. 263], where the hirer was considered not to have the entire management and control over the things so hired; from which cases the present is distinguishable, because the present hiring was for no such particular purpose, but to go with the carriage where the defendant chose, and to be under his general authority and orders in that respect for a certain time. By such a letting for a certain time the defendant became possessed in law of the horses so let to him whilst he was using them under such letting. It would be so clearly, if they had not been retained in the custody of a driver provided by Bryant, according to the doctrine of Lord Ellenborough in *Lotan* v. *Cross* [2 Camp. 464], where he says, "show a letting" (sc. of the chaise) for a certain time to Brown, and the possession would be in him;" and in *Hall* v. *Pickard* [3 Camp. 187], whereby the horses being let to hire to Dr. Carey for a certain term, he, and not the owner, was deemed to be the person in possession of them, as he, Dr. Carey, had a right to retain them till that time was expired, though in that case indeed Dr. Carey is stated to have been driving them by his own servants when the mischief was done. But in the present case, although the horses were continued in the custody of a driver provided by Bryant, yet as the horses and the driver were to be for the use and subject to the general directions of the defendant, and as the defendant had a right to retain them till the time for which they were hired was expired, and as they were at the time the mischief was done in the use and under the directions of the defendant, I think that the driver was for this purpose in

the employ, and in law, the servant of the defendant, and that the defendant was in law answerable for the driver's negligence in the execution of the defendant's orders in such employ, in whatever situation the driver might also stand with respect to Bryant, with regard to Bryant's responsibility for him, at the election of the plaintiff. A person may stand in the relation of servant to two different persons as his masters in two different respects with regard to the same thing, and this even though the service done, or to be done, be special and limited to a single act, as appears in 2 Roll's Abr. 556, pl, 14; though that indeed was a case in which the party employing the officer, who was considered as his servant, would not be responsible for the conduct of the officer as his servant, but that would be so on account of the duties and obligations upon the officer, and upon grounds not applicable to the question of the defendant's responsibility in the present case. There it is said, "If a serjeant of London, or bailiff in a county, take a man upon a capias in process at my suit, and J. S. rescue him out of his possession, I may have a general writ of trespass against him, because the serjeant is as well my servant to this purpose as the servant of the king;" (that is, as it is expressed in Hobart 180, minister as well to the person suing out the process as to the court); "and therefore the taking out of the possession of the serjeant, who is my servant, is a taking out of my possession." Tr. 15 Ja. entre Wheatley and Stone, adjudged in a writ of error at Serjeant's Inn. So in the present case, I think the horses were to be considered in law as in the possession of the defendant, and the driver as the defendant's servant, for the purpose for which he was sent to the defendant; and I think, that a taking of the horses or driver away from the defendant's service during the time for which he had hired them, would have been a taking them away from him, for which he might have maintained an action of trespass, as for a taking them out of his possession and service; and, consequently, that he was answerable for the driver's negli-

gence in driving him, the defendant, whilst under his, the defendant's, orders, and it is to be considered, I think, as the defendant's driving of the carriage and horses by his servant. That the responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen, is established by the case of *Bush* v. *Steinman* [1 Bos. & Pul. 404], where the owner of a house having contracted with a surveyor to repair the house for a stipulated sum, and the surveyor having contracted with a carpenter to do it, who employed a bricklayer, who contracted for a quantity of lime with a lime burner, the owner of the house was held responsible for the damages occasioned by the lime burner's servants improperly laying that lime in the high road. The principles on which that case was decided apply, I think, directly to the present case, and shew the responsibility of the present defendant; and, indeed, Heath, J., puts the very case, that where a person hires a coach upon a job, and a job coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though (as the Judge is there made to say), he is not his servant. But under the circumstances of the present case the defendant was, I think, liable for the negligence of the driver as his servant, driving the defendant pursuant to his orders (the driver being, in law, his servant, in my opinion, for that purpose according to the declaration), and, consequently, that the non-suit ought to be set aside and a new trial granted.[4]

Rule discharged.

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[4] The opinion of Bailey, J., in favor of the plaintiff, and Abbott, C. J., in favor of the defendant, are omitted.

JONES *v.* SCULLARD.

IN THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE, 1898.

Law Reports, 2 Queen's Bench Division, 565.

Further consideration before Lord Russell of Killowen C. J., after trial with a jury.

The plaintiff was a jeweller carrying on business at 368, Holloway Road. On June 22, 1897, the day of the Queen's Jubilee, whilst the defendant was being driven in his brougham in the Holloway Road, the driver of the brougham lost control of the horse, which bolted and dashed through the window of the plaintiff's shop, doing considerable damage. The plaintiff sued the defendant for his loss, which he claimed to have been caused by the negligence of the driver. The evidence showed that the horse which was driven in the brougham was a hard-mouthed horse and a puller, and that the driver ought to have known that fact by inspection of its mouth, which showed signs of hardness caused by pulling; that the reins ought consequently to have been fastened to the bar, whereas they were improperly fastened to the cheek of the bit; that the curb was not sufficiently tightened, and that it was by reason of this adjustment of the reins and curb that the driver lost control of the horse. It appeared that the brougham, the horse, the harness, and the suit of livery which the driver was wearing were the property of the defendant; but the driver, a man named Loveday, was a coachman in the employment of a livery-stable keeper named Walker, at whose stable the defendant kept the brougham and horse. The defendant had kept his horses and carriage at livery at Walker's stable since January 3, 1897. He first began to be driven by Loveday on May 10; but from

that date down to the time of the accident Loveday invariably drove for him. After Loveday had driven for him a short time, between May 24 and May 31, the defendant supplied him with the suit of livery which he was wearing at the time of the accident. The particular horse which caused the accident had only been recently purchased by the defendant in the country, and was first brought up to London on June 14, between which date and June 22 it was driven by Loveday at most some three or four times. The defendant, who disputed that the horse was hard-mouthed or improperly fitted, also contended that, even if it were, he was not responsible, on the ground that Loveday was not his servant, but was the servant of Walker, the livery-stable keeper. The Chief Justice left to the jury the question of negligence only. The jury returned a verdict for the plaintiff. The question as to the person who was responsible for Loveday's negligence was reserved for further consideration, it being agreed that the judge should have power to draw all necessary inferences of fact.[1]

Aug. 9. Lord Russell of Killowen, C. J.: This is a case which has given me considerable anxiety as to how I ought to decide it. It raises a point of importance, which I think it is eminently desirable should be considered in the Court of Appeal.

The question which arises for decision upon the facts of this case is whether the fact that Loveday was undoubtedly in a general sense the servant of Walker and could not be dismissed from Walker's employment by any act of the defendant is sufficient to relieve the defendant from responsibility for the negligence of Loveday while driving him. It is clear upon the authorities that it is not at all impossible for a man to be in the practical relation of servant to two different employers. It is clear that, although Loveday was in the general employment of Walker, he may at the time have been in the particular employment of

[1] The Reporter's statement of the facts of the case is omitted.

the defendant, and the servant of the defendant in relation to the particular matter of driving the defendant's carriage. The question is whether he was so.

I will now proceed to examine the leading authorities upon this subject, because I do not hesitate to say that, if it were not for those authorities, I should not have felt the perplexity which I have felt as to how the case should be decided. At the same time, I should add that no one of those cases is, in all essential characteristics, on all fours with the present. In no one of those cases is there the conjunction of all the facts which exist here, namely, the ownership by the defendant of the brougham, the horse, and the harness, the fact that the livery was supplied to the driver by the defendant, and the fact that the horse which was being driven was one to which the driver had not been previously accustomed.

The first of the authorities to which I have referred is *Laugher* v. *Pointer* [5 B. & C. 547]. The point there raised was considered of such importance that it was the subject of consideration, not only by the Court of King's Bench, but also by the whole body of the common law judges. The King's Bench were equally divided, and it was stated by Parke, B., when delivering the judgment of the Court of Exchequer in *Quarman* v. *Burnett* [6 M. & W. 499, at p. 507], that the twelve judges also differed in opinion. Whether they also were equally divided or not I have been unable to ascertain, although I have been at some pains to do so. The decision of the twelve judges is unreported, and a search in the Record Office has, I understand, thrown no further light upon the matter. The report in Barnewall and Cresswell gives the decision of the King's Bench only, and the head-note to that report is as follows: "Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person: *Held*, by Abbott, C. J. and Lit-

tledale, J., that the owner of the carriage was not liable to be sued for such injury, Bayley and Holroyd, JJ. diss." In his judgment Abbott, C. J. [5 B. & C. at page 577], says: "I must own that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about London for a day, and hiring them to draw it for a stage on the road I am travelling, the driver being in both cases furnished by the owner of the horses in the usual way; nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions and hiring a carriage with them of their owner." With that observation I am disposed to agree. Later on he says [5 B. & C. at page 580]: "I have acknowledged the difficulty of drawing a line with reference to time and distance; and I think we must look to other circumstances in order to ascertain the obligation of the hirer. Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice, of the coachman." That, I think, is an observation pregnant with good sense. It may be that case is well decided; but in my opinion it does not govern the present.

The next case to which I wish to refer is that of *Brady* v. *Giles* [1 Mood. & Rob. 494]. There the defendant, who was a carriage-jobber in London, let on hire to a Mr. M'Kinlay a barouche and four horses for a trip to Windsor and back. The horses were driven by two of the defendant's postilions. On the journey back to town the barouche, owing, it was alleged, to the negligence of the postilions, came into collision with the plaintiff's gig. A question arose at *nisi prius* as to whether the postilions were acting as the servants of the defendant or of M'Kinlay. Lord Abinger, before whom the case was tried, left the question to the jury, and said that "it had always appeared to him that the Court

of King's Bench had pursued an erroneous course in *Laugher* v. *Pointer* [5 B. & C. 547] when they allowed the question now raised to be discussed as if it were a question of law for the judge to decide. It always appeared to him that it was quite impossible to lay down any rule of law on such a point. No satisfactory line could be drawn at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceased to be responsible and the temporary hirer became so. Each case of this class must depend upon its own circumstances." That appears to me to be a sound view; and it was in consequence of what was there said that in the present case I thought it right that, when reserving this case for further consideration, I should be empowered to draw all proper inferences from the facts.

The next case is *Quarman* v. *Burnett* [6 M. & W. 499]. There the defendants, two ladies, who kept a carriage, had for a period of about three years been in the habit of hiring for the day or for the drive horses and a coachman from a particular jobmistress. They had during that time always been driven by the same coachman, to whom they paid a small gratuity for each drive. Owing to the negligence of the coachman in leaving the horses unattended while the carriage was standing at the door of the defendants' house, the horses started off and came into collision with the plaintiff's chaise. A verdict having been found for the plaintiff, the Court of Exchequer set it aside, on the ground that there was no evidence that the coachman was acting as the servant of the defendants. That case might appear to be an authority in favor of the defendant; but I would point out that its facts differ from those in the present case in two material particulars. In the present case the horse which was being driven was the property of the defendant; and, secondly, not only was it his property, but it was one which he had only recently purchased, and

with which consequently the driver supplied by the livery-stable keeper had but an imperfect acquaintance. Both those matters are to my mind material. The materiality of the ownership of the horse lies in this: so long as the hirer contracts with the livery-stable keeper for the supply of a complete equipage to drive him by the day or hour, as the case may be, and the stable keeper in pursuance of that contract supplies carriage, horses, and the man to drive them, the hirer has no control whatever over the driver, except so far as he can indicate the direction in which he wishes to be driven. He could not order him to increase the speed, for the driver might lawfully refuse to do so on the ground that he was acting under his master's orders in driving slowly. . But where the hirer of the coachman is himself the owner of the horse, he is enabled to dictate to the driver as to how fast he shall drive, and the driver is bound to take his orders from him. The driver is in that case under the control of the hirer as to the manner of his driving. Then comes the further consideration that the horse was one which had only come into the possession of the defendant a few days before the date of the accident, and had been driven by Loveday an insufficient number of times to enable him to learn the peculiarities of the horse's temper and the manner in which, having regard to that temper, the bit and reins required to be adjusted. Further, although the defendant could not dismiss Loveday from Walker's employment, he could if dissatisfied with his manner of driving refuse to be driven by him. These matters, to my mind, form elements to be considered in determining the relation of the driver to the defendant.

The only two other cases to which I wish to refer seem directly to support the view which I have taken in the present case. The first of those two cases is *Rourke* v. *White Moss Colliery Co.* [2 C. P. D. 205]. There the defendants, having begun sinking a shaft in their colliery, for which purpose they

had fixed an engine near the mouth of the shaft, agreed with W to do the sinking and excavating at a certain price per yard, W to find all labor, the defendants to provide and place at the disposal of W the necessary engine-power with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W, while working at the bottom of the shaft was injured by the negligence of the engineer. It was held that, though the engineer remained the general servant of the defendants, yet, being under the orders and control of W at the time of the accident, he was acting as the servant of W, and not of the defendants, who were, therefore, not liable for his negligence. That case makes it quite clear that a man may be the general servant of one person, and yet at the same time be the servant of another in relation to a particular matter, and it also shews that the important element, whereby to determine whether he is the servant of the one person or of the other in relation to the particular business on which he is engaged, is which of the two persons had the control of him in the conduct of that business.

The other case is *Donovan* v. *Laing, &c., Syndicate*. [1893, 1 Q. B. 629.] There the defendants contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers and was employed by them to direct the working of the crane, sustained an injury through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant. It was held that though the man in charge of the crane remained the gen-

eral servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. That case is on all fours with *Rourke* v. *White Moss Colliery Co.* [2 C. P. D. 205]. Now, apply the principle of those cases to the facts of the case before me. What control had the livery-stable keeper over the driver while driving the defendant's horse? Absolutely none. The whole control was in the defendant, who could have ordered the driver to go fast or slow, or stop or go on, just as he pleased, or to keep the horse without food, or otherwise manage the horse as he directed. Bowen, L. J., in the course of his judgment in *Donovan* v. *Laing, &c., Syndicate* [1893, 1 Q. B. 629], indeed says [1893, 1 Q. B. at p. 634]: "The principal part of the argument for the plaintiff was founded on what may be called the carriage cases: *Laugher* v. *Pointer* [5 B. & C. 547] and *Quarman* v. *Burnett* [6 M. & W. 499]; but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage." But in so distinguishing the case with which he was dealing from the carriage cases, it is clear that he only intended to include under that latter term cases in which the stable-keeper is letting out a complete equipage, carriage, horses, and man, and did not intend to include under it such a case as the present.

The principle, then, to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negli-

gence on the part of the driver. But it seems to me to be altogether a different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver. And in such a case, especially if, as here, the driver has driven the hirer for a considerable period of time and been approved by him, and the horse is one the characteristics or peculiarities of which neither the livery-stable keeper nor his driver have had any practical opportunity of becoming acquainted with, there is, it seems to me, evidence upon which a jury would be justified in coming to the conclusion that the driver was upon the occasion in question acting as the servant, not of the livery-stable keeper, but of the person who hired him. I have come to that conclusion. There must be judgment for the plaintiff.

Judgment for the plaintiff.

DEMPSEY *v.* CHAMBERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1891.

154 *Massachusetts Reports*, 330.[1]

HOLMES, J.: This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the Court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of opinion that the bill of exception does not purport to set forth all the evidence on which the finding was made. Therefore, the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified

[1] The Reporter's notes of the arguments of counsel are omitted.

seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "fained to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frankpledge. *Byington* v. *Simpson,* 134 Mass. 169, 170; Fitz. Abr. Corone, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. *New England Dredging Co.* v. *Rockport Granite Co.,* 149 Mass. 381, 382; *Fuller & Trimwell's case,* 2 Leon. 215, 216; Sext. Dec. 5. 12, De Reg. Jur., Reg. 9. D. 43. 26. 13. D. 43. 16. 1, sec. 14, gloss. See also cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Ed. I. 128 (Rolls ed.); 38 Lib. Ass. 223, pl. 9; *S. C.* 38 Ed. III. 18, Engettement de Garde. See Plowd. 8 *ad fin.,* 27, 31; Bract. fol. 158 b, 159 a, 171 b; 12 Ed. IV. 9, pl. 23. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might justify it also. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitz. Abr. Bayllye, pl. 4, and doubted in Bro. Abr. Trespass, pl. 86; but it has been followed or approved so continuously, and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godbolt, 109, 110, pl. 129; *S. C.* 2 Leon. 196, pl. 246; *Hull* v. *Pickersgill,* 1 Brod. & Bing. 282; *Muskett* v. *Drummond,* 10 B. &

C. 153, 157; *Buron* v. *Denman*, 2 Exch. 167, 188; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 13 Moore, P. C. 22, 86; *Cheetham* v. *Mayor of Manchester*, L. R. 10 C. P. 249; *Wiggins* v. *United States*, 3 Ct. of Cl. 412.

If we assume that an alleged principal by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (D. 46. 3. 12, sec. 4; D. 43. 16. 1, sec. 14; Y. B. 30 Ed. I. 128) has been changed to the dogma *acquiparatur* ever since the days of Lord Coke. 4 Inst. 317. See Bro. Abr. Trespass, pl. 113; Co. Lit. 207 a; Wingate's Maxims, 124; Com. Dig. Trespass, C, 1; *Eastern Counties Railway* v. *Broom*, 6 Exch. 314, 326, 327; and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort. *Adams* v. *Freeman*, 9 Johns. 117, 118. Anderson and Warberton, JJ., in *Bishop* v. *Montague*, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that, if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5. 11. 23. Perhaps the application of the doctrine would be avoided on the grounds that the facts did not show an act done for the defendant's benefit. *Wilson* v. *Barker*, 1 Nev. & Man. 409; *S. C.* 4 B. & Ad. 614, *et seq.*; *Smith* v. *Lozo*, 42 Mich. 6. As in other cases it has been on the ground that they did not amount to such

a ratification as was necessary. *Tucker* v. *Jerris,* 75 Maine, 184; *Hyde* v. *Cooper,* 26 Vt. 552.

But the language generally used by judges and text writers, and such decision as we have been able to find, is broad enough to cover a case like the present when the ratification is established. *Perley* v. *Georgetown,* 7 Gray, 464; *Bishop* v. *Montague,* Cro. Eliz. 824; *Sanderson* v. *Baker,* 2 Bl. 832; *S. C.* 3 Wils. 309; *Barker* v. *Braham,* 2 Bl. 866, 868; *S. C.* 3 Wils. 368; *Badkin* v. *Powell,* Cowper, 476, 479; *Wilson* v. *Tumman,* 6 Man. & G. 236, 242; *Lewis* v. *Read,* 13 M. & W. 834; *Buron* v. *Denman,* 2 Exch. 167, 188; *Bird* v. *Brown,* 4 Exch. 786, 799; *Eastern Counties Railway* v. *Broom,* 6 Exch. 314, 326, 327; *Roe* v. *Birkenhead, Lancashire, & Cheshire Junction Railway,* 7 Exch. 36, 41; *Ancona* v. *Marks,* 7 H. & N. 686, 695; *Condit* v. *Baldwin,* 21 N. Y. 219, 225; *Exum* v. *Brister,* 35 Miss. 391; *Galveston, Harrisburg, & San Antonio Railway* v. *Donahoe,* 56 Texas, 162; *Murray* v. *Lovejoy,* 2 Cliff. 191, 195; see *Lovejoy* v. *Murray,* 3 Wall. 1, 9; Story on Agency, secs. 455. 456.[2]

Exceptions overruled.

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[2] The Court's discussion of the question whether the ratification was established is omitted. An affirmative conclusion on this question was reached.

CHAPTER II.

LIABILITY OF AN UNDISCLOSED PRINCIPAL.

RAILTON *v.* HODGSON.

In the Court of Common Pleas, before Mansfield, C. J., 1804.

4 Taunton's Reports, 576, note a.

The facts were, that the defendant, Hodgson, had formerly been a clerk with Smith, Lindsay, and Co., and afterwards set up in business for himself, and had a counting-house for himself at the house of Smith, Lindsay, and Co., which the vendors knew; that he purchased goods himself, and directed the vendors to draw bills upon Smith, Lindsay, and Co., and make out invoices to that house, which was then a house of good credit, and without whose security Hodgson could not have obtained credit and made the purchases. Smith, Lindsay, and Co. received from the defendant a commission of from 2 and one-half to 5 per cent. upon the goods. The vendors entered the goods in their own books, in the names of Smith, Lindsay, and Co., made out the invoices in the names of, and sent them to Smith, Lindsay, and Co., and drew bills upon them for the amount, which Smith, Lindsay, and Co. accepted: the defendant insisted that he purchased as the agent of Smith, Lindsay, and Co., and in their names, and on their account, as he used to do when in their employ. There was proof, however, of his being the principal, and having bought the goods on his own account: The plaintiffs obtained a verdict, and Mansfield, C. J., in summing up the evidence, ob-

served to the jury, "that it was admitted these goods were never delivered to Smith, Lindsay, and Co.; the defendant had the goods, and the profits and loss: Smith, Lindsay, and Co. were only to have a commission, for which they lent their credit. Suppose a principal authorizes a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment. It appeared that Hodgson had been a trader from 1798. Suppose Hodgson had not been known to be the buyer, he would have been liable; Smith, Lindsay, and Co. would only have been nominal buyers. If Hodgson had really paid Smith, Lindsay, and Co., it would have depended upon circumstances whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so. What pretence was there that the plaintiffs should be thrown upon the insolvent estate of Smith, Lindsay, and Co., who never had the goods? This was a stronger case than that of a dormant partner. The buyer must be liable, though a third person may also, unless there is an express agreement that the buyer shall not be liable." The jury found a verdict for the plaintiffs. A motion was made in the following term to set aside the verdict, and have a new trial; but the Court refused it.[1]

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[1] *Accord*: Isham *v.* Burgett, 157 Mass. 546, 1893. (The X Co. was incorporated to build an electric line. No capital was paid in. B and C built the line with their own funds and received all the stock of the company in payment. During the course of construction B ordered from A certain poles, stating that they were for the company. A sued B for the price of the poles and recovered. Holmes, J.: "The Judge was warranted in finding that the real principal, as well as the mouth piece of the transaction, was the defendant, so that, although he used the name of his creature, the corporation, in such a way as to bind it to the plaintiffs at their election, still, when they discovered the facts, they had the right also to go against him. * * * If the defendant saw fit to use the name of the corporation on his own behalf, as representing himself when engaged in a particular business, he cannot complain of being held if the fact happens to be discovered.")

THOMSON *v.* DAVENPORT.

In the Court of King's Bench, 1829.

9 Barnewall and Cresswell's Reports, 78.

This was a writ of error, brought upon a judgment obtained in the borough court of Liverpool against the plaintiff in error. The plaintiff below declared for goods sold and delivered. Plea, general issue. Upon the trial before the mayor, and bailiffs, assisted by the recorder, a bill of exceptions was tendered to the direction given by the mayor, bailiffs, &c., by the said recorder to the jury. The bill of exceptions stated, that one Thos. M'Kune was produced and examined upon oath as a witness by the counsel for the plaintiffs, to maintain the issue on their parts. And M'Kune stated in evidence, that he, M'Kune, was established in Liverpool as a general Scotch agent and, amongst others, acted as agent for the defendant, who resided in Dumfries; that, in March, 1823, he received from the defendant a letter, containing an order to purchase various goods, and, amongst others, a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiffs' attorney, and was read in evidence as follows:—"Dumfries, 29th March, 1823. Annexed is a list of goods which you will procure and ship per Nancy. Memorandum of goods to be shipped: twelve crates of Staffordshire ware, crown window glass, ten square boxes," &c., &c. That he, M'Kune, provided himself with the goods mentioned in this letter, and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in Liverpool; that at the time he ordered the glass and earthenware, he saw the plaintiff, Mountford Fynney, himself, and, to the best of his recollection, told him, that he, M'Kune, had an order to purchase some goods, and

that they were the same house for whom he had purchased goods from the plaintiffs the preceding year; and he also stated, to the best of his recollection, that as he was a stranger to the nature of the goods, he hoped that the plaintiffs would let him have the same as before, to save him from blame by his employer;" but he, M'Kune, did not shew the *plaintiffs the letter containing the order, nor did he mention the name of any principal;* that he then either gave the plaintiff, Mountford Fynney, a copy of the order, or produced to him the original order, that Fynney might himself take a copy, but he rather thought the former was the fact, and that the plaintiff, Fynney, did not see the original, though he could not say positively; that the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was 193*l.* 7*s.* 8*d.*, but adding the discount, 219*l.* 10*s.*, and rendered invoices thereof to M'Kune, headed thus: "Mr. Thomas M'Kune bought of John and James Davenport" (which was the plaintiffs' firm); that M'Kune entered the net amount (193*l.* 7*s.* 8*d.*) to the credit of the plaintiffs in an account with them in his books, and charged the same sum, with the addition of 2 per cent. for the commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names; that afterwards, in April, 1823, and before the credit for the goods had expired, M'Kune became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of 20,000*l.*; whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of M'Kune as to the precise words used by him to the plaintiffs at the time he gave them the order for the goods; but it appeared to them (the said recorder) upon

the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs; and directed the jury, that if they were of opinion that the defendant's name as principal was mentioned by M'Kune to the plaintiffs at the time the order was given, or that the plaintiffs then knew that the defendant was the principal, their verdict ought to be for the defendant; but if they were of opinion that the defendant's name as the principal was not mentioned by M'Kune to the plaintiffs at the time of the order being given, and that the plaintiffs did not then know that the defendant was the principal, and they did not think, upon all the said facts of the case, that the plaintiffs at the time of the order being given knew who the principal was, so that they then had a power of electing whether they would debit the defendant or M'Kune, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that M'Kune was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference in the case. The jury, after finding as a fact that the letter containing the order was not shewn and made known to the plaintiffs, gave their verdict for the plaintiffs below for 219*l.* 10*s.* It was contended, that the mayor and bailiffs, by the recorder, ought to have directed the jury that if they were satisfied that Davenport, &c., at the time of the order being given knew that M'Kune was buying the goods as an agent, even though his principal was not communicated or made known to them, they, by afterwards debiting M'Kune, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling on Thomson.[1]

Lord Tenterden, C. J.: I am of opinion that the direction given by the learned Recorder in this case was right, and that the verdict was also right. I take it to be

[1] The Reporter's notes of the arguments of counsel are omitted.

a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison* v. *Gandasscqui* [4 Taunt. 574], and *Paterson* v. *Gandasscqui* [15 East, 62], the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another; that is, that he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further enquiry; but they made no further enquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a British merchant is buying for a foreigner. According to

the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, Whether, in consequence of their living at Dumfries, it may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to M'Kune only, and not to a person living, though not in a foreign country, yet, in that part of the king's dominions which rendered him not amenable to any process of our courts? But, instead of directing the attention of the Recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that M'Kune was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting M'Kune, had elected him for their debtor. The point made by the defendant's counsel, therefore, was, that if the plaintiffs knew that M'Kune was dealing with them as agent, though they did not know the name of the principal, they could not turn round on him. The Recorder thought otherwise: he thought that though they did know that M'Kune was buying as agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the Court below must therefore be affirmed.[2]

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[2] The opinions of Bayley, J., and Littledale, J., reaching the same result are omitted. In the course of his opinion Bayley, J., says: "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the

Judgment affirmed.[3]

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justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent." Littledale, J., does not touch on the effect on the rights of the third person of the undisclosed principal's settlement with his agent. Parke, J., having been concerned as counsel gave no opinion.

[3] *As to what amounts or does not amount to an election see:*

Priestly *v.* Fernie, 3 H. & C. 977, 1865. (C, master of a vessel signed a bill of lading in his own name. A sued C and obtained a judgment. The judgment remaining unsatisfied A brought suit against B, the owner of the vessel, for the non-delivery of the goods. B pleaded the suit against C. Demurrer to plea overruled, and judgment for B. Bramwell, B: "Where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be obtainable against the principal. The very expression that where a contract is so made the contractee has an *election* to sue agent *or* principal, suppose he can only sue one of them, that is to say, sue to judgment.")

Calder *v.* Dobell, L. R. 6 C. P. 486, 1871. (B appointed C his, B's, agent to buy cotton. C bought cotton from A giving B as his principal, bought and sold notes being exchanged between A and C. A made out an invoice to C, and A demanded payment from C. C refused. A sued B. *Held*: that the acts of A did not amount to an election to look only to C and that he, A, could now recover from B.)

Curtis *v.* Williamson, L. R. 10 Q. B. 57, 1874. (C was the agent of B. Without disclosing agency C purchased for B goods of A. C became insolvent and A became aware of the agency. A sent an affidavit of proof of debt due against estate of C, which affidavit, against A's subsequent protest, was filed. A sued B. Verdict for A. Rule to enter non-suit on the ground that A had elected to hold the agent discharged. Quain, J.: "In general, the question of election can only be properly dealt with as a question of fact for the jury * * * but there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from resorting to the principal."

Merrill *v.* Kenyon, 48 Conn. 314, 1880. (C was the agent of B. C bought goods from A without disclosing agency. A subsequently took notes from C on account of debt. A sued B for the price of the goods. B asked the Court to charge that if A knew that C was an agent, and then received the notes, the presumption was that A received C as his debtor and he, A, could not recover. The Court refused to charge as requested, but did charge that if A at the time he took the notes knew that C was the agent of B, then the presumption was that A had made an election. The Court also charged that A was not obliged to make their election on a mere rumor, "but only on such information as they could rely upon." Verdict for A. On appeal, *held*: that the law had been properly presented to the jury.)

Byington *v.* Simpson, 134 Mass. 169, 1883. (C was the agent of B. C entered into a contract for B with A signing the contract as "agent" but not disclosing who he was agent for. A sued B and recovered. Holmes, J., said: "The most that could fairly be argued in any case would be, that, under some circumstances, proof that the other party

knew of the agency, and yet accepted a writing which did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was himself the principal. But these are questions of fact, and, as a matter of fact, it is obvious, and it is found, that the defendant was the principal, and that the contract was made with her.")

FRADLEY *v.* HYLAND.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK, 1888.

37 Federal Reporter, 49.

WALLACE, J.: The libel sets forth two causes of action for supplies purchased by one Gibson.[1]

The facts which appear in evidence are these: During the period in which the supplies were purchased, one Gibson, who was the owner, and was managing certain canal-boats of his own, was employed by the appellant, to manage certain canal-boats for the latter. Gibson was to obtain employment for the boats, and return the net earnings monthly to appellant, after paying for all repairs and supplies, and deducting his own commissions. His instructions were not to obtain supplies upon credit, but, if not in funds from the earnings, to call upon the appellant. Monthly settlements of account took place between Gibson and the appellant, in which Gibson was allowed all items for supplies paid or contracted for by him against the earnings of the boats, and a considerable fund was always left in his hands by the appellant. Gibson ceased to act as appellant's agent September 1, 1886. The supplies were sold to him prior to that time. The libellant supposed that Gibson was the owner of all the boats he was managing, and dealt with him as such, selling him supplies for all indiscriminately, charging the price to him, and taking his notes from time to time, or those of one Isham, his clerk. The claim to recover the part of these supplies used on appellant's boats is the first cause of action set forth in the libel. One Kelly had also sold supplies to Gibson for the same boats, sup-

[1] Only that part of the opinion which relates to the first cause of action is reprinted.

posing that Gibson was the owner, and had received Gibson's notes, or notes of Gibson's clerk, for the amount. After these notes had matured, Gibson asked the libellant to pay them for him to Kelly, and the libellant did so, receiving new notes from Gibson for the amount. There was no assignment to libellant of Kelly's original demand against Gibson. The claim for the supplies thus sold by Kelly to Gibson is the second cause of action set forth in the libel. After Gibson ceased to act as agent for appellant, the libellant discovered that some of the supplies had been purchased for the appellant's boats, and, being unable to collect his demands of Gibson, made claim against the appellant therefor. Until then the appellant did not know of the transactions between Gibson and the libellant, or between Gibson and Kelly. The moneys left by appellant in Gibson's hands were at all times more than the amount of the libellant's demands, and Gibson was indebted to the appellant in more than that amount when he left the appellant's employ, and when this libel was filed.

As to the first cause of action no question is made by the appellant that it is not of admiralty cognizance, but he insists that he is not liable as a principal for the supplies sold to his agent by the libellant, under the circumstances of the case. The general rule is familiar that, when goods are bought by an agent, who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification stated by Lord Mansfield, in *Railton* v. *Hodgson*, 4 Taunt. 576, and by Tenterden, C. J., and Bayley, J., in *Thomson* v. *Davenport*, 9 Barn. & C. 78. As stated by Mr. Justice Bayley, it is "that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent

here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller, where he has looked to the responsibility of the agent." The principal must respond to and may avail himself of a contract made with another by an undisclosed agent. When he seeks to enforce a bargain or purchase made by his agent the rule of law is that, if the agent contracted as for himself, the principal can only claim subject to all equities of the seller against the agent. In the language of Parke, B.: "He must take the contract subject to all equities, in the same way as if the agent were the sole principal" (*Beckham* v. *Drake,* 9 Mees. & W. 98), and accordingly subject to any right of set-off on the part of the seller (*Borries* v. *Bank,* 29 L. T. N. S. 689). Thus the rights of the principal to enforce, and his liability upon, a contract of sale or purchase made by his agent, without disclosing the fact of the agency, are precisely co-extensive, as regards the other contracting party, if the limitation of his liability is accurately stated in the earlier cases. The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in *Heald* v. *Kenworthy,* 10 Exch. 739, to the effect that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is *Davison* v. *Donaldson,* 9 Q. B. Div. 623. but, as is shown in *Armstrong* v. *Stokes,* L. R. 7, Q. B. 599, the version of *Heald* v. *Kenworthy,* while a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not

to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. This case decides that the principal is not liable when the seller has dealt with the agent supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See, also, *Irvine* v. *Watson,* 5 Q. B. Div. 102. Under such circumstances it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In that case the court was dealing with a contract made by an agent which was within the scope of the authority conferred on him, but which was nevertheless made by the agent as though he were acting for himself as principal. In the present case Gibson had no authority at all to make a purchase upon the credit of the appellant. But as it appears that appellant, in the monthly settlements of account with Gibson, allowed him out of the earnings charges for supplies for which the latter had not actually paid, he must be deemed to have authorized Gibson to purchase supplies for him upon Gibson's own credit. Under the circumstances, if Gibson had purchased supplies, purporting to act as an agent of appellant in doing so, appellant, by consenting to their being used for his benefit, and by allowing the price in his settlements with Gibson, would have been liable to those who sold to him upon the theory of ratification. But, as Gibson did not assume to act as agent in making the purchases, there is no basis for applying the doctrine of ratification.

Very different considerations govern the case in which an agent who assumes to represent an undisclosed principal buys of a seller upon credit, and one in which the agent assumes to be acting for himself, and the seller deals with him, and gives him exclusive credit, supposing him to be the only principal. In the first, if the agent has authority, express or implied, to buy upon credit for the principal, or

ostensible authority to do so, upon which the seller relies, then, by the familiar rules of law, the contract is the contract of the principal, and is none the less so because the name of the principal does not happen to have been disclosed. The principal is bound by the acts of his agent within the scope of his real or apparent authority; and the seller understands that, even though he may hold the agent personally responsible, he may also resort to the undisclosed principal. But in the other, as the seller does not rely upon any ostensible authority of the one with whom he contracts to represent a third person, he can only resort to the third person as principal, and charge him as such, when the purchase is made by one having lawful authority to bind the third person. It is immaterial, in such a case, whether the contract is made by an agent who is employed, in a continuous employment or in a single transaction, by a principal, or whether he is one who may be deemed a general, instead of a special agent. "When the agency is not held out by the principal by any acts or declarations or implications to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has apparently authorized, because he has not misled the confidence of the other party who has dealt with the agent." Story, Ag. Sec. 133. It is therefore difficult to understand how, as an original proposition, it could be reasonably maintained that there is any liability on the part of one who has employed another to manage his interests in a business, or series of transactions, in which, as an incident, purchases of goods are to be made, has given him instructions not to purchase on credit, and has supplied him with funds to purchase for cash, to a seller who has sold to the person employed upon credit, and dealt with him as the only principal. *Taft* v.

Baker, 100 Mass. 68. Of course he would be liable, and the instructions not to buy on credit would go for nothing, if he did not supply the agent with funds to pay for the necessary goods, because in that case the agent would have implied authority to buy them on credit. So, also, in a case which may be supposed, where a principal knows, or ought to know, that the agent is buying on credit in his own name, yet the principal takes all the income of the business without making any provision for payment to those who have trusted the agent, the principal would be liable, because in such a case his conduct would be inconsistent with good faith, and he ought not to be permitted to avail himself of the benefits without incurring full responsibility for the agent's acts. But it is probably too late to consider the questions thus suggested upon principle; and it may be accepted as law that the seller, under the circumstances of a case like the present, upon discovery of the principal, can resort to and recover of him, if he has not *bona fide* paid the agent in the meantime, or has not made such a change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller. Story, Ag. Sec. 291, 1 Pars. Cont. 63; *Fish* v. *Wood,* 4 E. D. Smith, 327; *Thomas* v. *Atkinson,* 38 Ind. 248; *Clealand* v. *Walker,* 11 Ala. 1058; *McCullough* v. *Thompson,* 45 N. Y. Super. Ct. 449; *Laing* v. *Butler,* 37 Hun, 144. In the case last cited the Court used this language: "Where the purchase has been made by the agent upon credit authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable."

According to these authorities, if it should be conceded that the facts in the present case warrant the inference that the appellant gave Gibson authority to buy either upon his own credit or upon the credit of the appellant, the libellant cannot recover. It certainly is not material that the appellant did not pay Gibson, or make any settlement with him,

on account of the libellant's demands specifically. It is enough that he did settle with Gibson for, and allowed him to retain in his hands sufficient moneys to pay, all outstanding liabilities contracted by him for the appellant's benefit, including the demands of the libellant. At the time of the last settlement the appellant had paid the libellant's demands and all outstanding liabilities contracted by Gibson as between Gibson and himself, and this was before the libellant knew any principal in the purchases other than Gibson himself.

HEFFRON *v.* POLLARD.

IN THE SUPREME COURT OF TEXAS, 1889.

73 Texas Reports, 96.

Appeal from Galveston. Tried below before Hon. W. H. Stewart. At the trial the judgment was for the plaintiff.[1]

GAINES, Associate Justice:[2]

The appellee brought the suit in the court below. He alleged that the defendant, who is appellant here, agreed in writing to pay W. H. Pollard & Co. and one F. W. Hendricks a certain price for certain pipe, the dimension of which he described in his petition, and that he was the owner of the claim by assignment from Hendricks and his partner, who with himself constituted the firm of W. H. Pollard & Co. The substance of the allegations in the petition with reference to the execution of the agreement is that W. H. Pollard & Co. and F. W. Hendricks "entered into a contract in writing with defendant, the said defendant so contracting in the name of John W. Fry, by which the said Pollard & Co. and the said Hendricks bargained and sold to the said defendant a large amount of property," etc. There is an alternative allegation in the petition in which the execution of the contract is set out in substantially the same language, but which alleges a different effect as to time of delivery and payment. The defendant pleaded *non est factum*. Upon the trial the plaintiff offered in evidence a contract in writing, of which the following is a copy:

"*The County of Galveston, State of Texas.*—This

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[1] The Reporter does not state the facts of the case. His notes of the arguments of counsel are omitted.

[2] Part of the opinion which deals with a question of practice is omitted.

agreement, made and entered into by and between John W. Fry on the one part and F. W. Hendricks and W. H. Pollard & Co. on the other part. It is hereby understood that the said John W. Fry shall take all of the 24 inch pipe (concrete), not exceeding 430 lineal feet, and all of the 18 inch pipe (concrete), not exceeding 700 lineal feet, at the following prices, viz., the 24 inch pipe at $1.50 per foot and the 18 inch pipe at $1.25 per foot. This said pipe to be paid for at the above rate as used by the said John W. Fry, and that the said John W. Fry shall not manufacture or use any other pipe of the above quoted sizes until all the above noted pipe is consumed in the city of Galveston.

[Signed] "John W. Fry, per Heffron,
"W. H. Pollard & Co.,
"F. W. Hendricks.

"Witnesses:
"N. A. Olcott,
"W. J. Junker."

In order to prove the execution of the contract so offered plaintiff was sworn as a witness and testified that "the written contract was signed J. W. Fry, per Heffron, and that it was so signed by Heffron for himself and in his presence"—meaning in the presence of the plaintiff. He also testified that he had made diligent search for the subscribing witnesses but could not find them. The defendant was then placed on the stand by plaintiff and testified that he signed the contract "as it purported J. W. Fry, per Heffron, but that he signed it as the agent of Fry and not for himself, and that he had no personal interest in it." The Court thereupon admitted the contract over the objection of the defendant and the defendant excepted.

We may treat the case for the purposes of this opinion as if there was sufficient evidence introduced to show that in executing the contract Heffron used the name of Fry in order to make the contract for his own benefit. We think the evidence subsequently introduced, though con-

flicting, warranted the jury in finding that the plaintiff's theory of the case was the true one, and it may be doubted whether this would not have cured the error of introducing it for want of sufficient evidence upon that point, if error it were.

But the question presents itself whether in a contract like this, which is made in the name of a principal and which is signed in his name by another as his agent, it is competent to show by parol evidence in order to recover on the written contract itself that in signing the agreement the one who purported to sign as agent signed the name of the principal for his own benefit and with the intention to bind himself? We have been unable to find any case in which this exact point has been determined. There are few branches of law that have given rise to more adjudications than that of principal and agent, and the cases are especially numerous in which the liability of the principal or agent as to third parties is discussed. There are certain principles, however, which are well settled. If the principal be disclosed, and it appear upon the face of the contract that agent does not intend to bind himself, the agent is not liable. If the principal be not disclosed it is universally conceded as to non-negotiable contracts not under seal that parol evidence is admissible to show the principal and to hold him liable upon a contract made in the name of the agent for his benefit. This may seem to be an exception to the rule that parol evidence is not admissible to vary the terms of a written contract, but it is not so held. It is said not to vary the terms of the contract, but to bring in a new party whom the law holds bound by it by reason of his relation to the party in whose name it is executed for his benefit. In such a case the principal may either sue or be sued. But a plaintiff can not sue both; he must make his election. If, however, the principal be disclosed, and the face of the writing shows that the agent is bound, it is presumed that the other party has elected in the contract itself

to look to the agent, and the principal is not liable upon it.

Chandler v. *Cox,* 54 N. H. 561, was a case in which the principals were sued upon a contract which was signed by their agent but which did not upon its face disclose the agency. It was, however, a question of fact whether or not the principals were known to be such at the time the contract was executed. The Court in an able and elaborate opinion, which reviews all the authorities, hold that if the principals were not known when the agreement was signed parol evidence was admissible to show the agency of the signer and to charge the principal; but that if in point of fact agency was then disclosed, such evidence tended to vary the writing and could not be admitted. The ground of the ruling upon the latter point was that if the plaintiff knew when the contract was entered into that it was made for the benefit of third parties the writing showed that they had elected to look to the agent for its performance, and parol evidence was not admissible to vary the writing by showing that they did not so elect. The contract now before us presents a different case, but we think a stronger one for the defendant. As to the legal effect of this contract upon its face there can be no doubt. It discloses the names and relation of all the parties connected with it. It binds Fry, the principal, and does not bind Heffron, the agent. If it had said in express terms that Fry was bound by the contract and Heffron not, the meaning in the light of the law would not have been more unmistakable.

Can Heffron be held liable upon this written agreement? Is it permissible in order to bind him to show by parol testimony an intention exactly contrary to that expressed on the face of the writing, namely, that Heffron was bound by it and that Fry was not bound? In our opinion this can not be done without violating a cardinal rule of evidence. It is very different from the case of an undisclosed principal. The law makes him responsible for the act of his agent. The act of the agent made for his benefit

and within the scope of the authority conferred by him is his act. In such a case parol evidence may be resorted to to show that by reason of a fact existing at the time the contract is made, not known to one of the parties, there is a third party for whose benefit it is made who is bound by it. The relation of principal and agent being unknown to one of the contracting parties he could not make an election at that time, and it is not to be presumed that he intended to look alone to the agent should it subsequently appear that the contract was made for the benefit of another who has given authority for its execution. The undisclosed principal may sue on a contract made for him in the name of his agent, and for a similar reason he is held liable to be sued. But we apprehend that if a contract in writing should expressly declare that if it should subsequently be disclosed that a party signing had a principal such principal should not be bound no evidence would be admitted to show a liability contrary to such express terms.

But there is another point of view from which this case must be considered. The effort in the court below was to show that the defendant assumed the name of Fry in order to make the contract for his own benefit. We understand the law to be that when a party for the purpose of transacting business adopts an assumed name, whether it be fictitious or the name of another, he is bound by a contract made in that name. In *Trueman* v. *Loder,* 11 Adolphus & Ellis, 589, Lord Denman says: "Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that of another or in a feigned name, or whether the contract be signed by his own hand or that of agent, are inquiries not different in their nature from the question, who is the person who has just ordered goods in a shop." In that case the principal had been engaged in doing business in the name of his agent and the contract was signed by the agent in his own name. See also *Melledge* v. *Iron Co.,* 59 Mass. 158; *Brown* v. *Parker,* 89 Mass.

337. In the present case also the name is not a fictitious one. It is the name of a real person. But the contract purports to bind him alone, and upon its face is inconsistent with the idea that the defendant in signing it may have intended to use it for his own business name. His signature as agent clearly negatives the conclusion that any such construction was intended to be put upon it. The intention of the parties to a written contract must be derived from the writing itself when its meaning is clear. Can it be said that the admission of parol evidence to show that the contract before us was made for the benefit of defendant and was intended to bind him does not violate this rule? We think not. The contract clearly shows the relation of all the parties to it, who was to be bound and who was not to be bound, and its legal effect can not be varied by such evidence.

The rule is further illustrated by the well recognized rule that although in case of an undisclosed principal the plaintiff may show there was a principal in order to bind him, yet the agent is not permitted to prove the same fact in order to free himself from responsibility. Such a contract shows clearly upon its face that he is bound, and the law will not permit him to show the contrary. To this there is an apparent but not a real exception. The agent may show in order to relieve himself from liability upon an apparent written agreement, which if real would bind himself upon its face, that it was agreed when it was signed that it should not take effect as a contract, but that the real contract was an unwritten one, which bound only his principal. In other words he may show that the writing was a mere colorable transaction and was understood by the parties to be not a contract at all and that the real contract was not in writing and bound only his principal. *Rogers* v. *Hadley,* 2 Hurl. & Colt, 227. So in this case we think that if it were true that the writing offered in evidence was understood and agreed to be a mere colorable transaction, intended to obscure defendant's real con-

nection with the contract, and if he really purchased the pipe the plaintiff could have recovered upon the real agreement notwithstanding the apparent contract entered into in writing.

If the plaintiff had alleged and proved a want of authority on the part of the defendant to make the contract for Fry, then also he could have maintained his action against defendant. But even in that case according to what appears to us the better reason and the weight of authority, his action would have been not upon the contract itself but upon the implied warranty or for the deceit. *Bartlett* v. *Tucker,* 104 Mass. 336; *Lander* v. *Castro,* 43 Cal. 497; *Hall* v. *Randall,* 29 Cal. 567. The defendant testified in effect that he had authority from Fry to make the agreement for him. The testimony of plaintiff is not necessarily inconsistent with the idea that he did have such authority, although in signing the agreement he may have acted for himself.

If the contract had been signed in the name of Fry only it would have been proper to have permitted it to be read to the jury upon proof that defendant signed it, that the contract was made for his benefit, and that he assumed the name of Fry as his business name in the transaction. But the writing was inconsistent with the theory that Fry's name was used as the name of the defendant, and therefore did not establish the plaintiff's case and should have been excluded. For the error in admitting it the judgment must be reversed.

In order for defendant to have availed himself of the illegality of the contract as a defence he should have pleaded it. (1 Chitty's Plead., 16 Am. ed., 506.)

Judgment reversed and the cause remanded.[3]

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[3] *On the question of admitting parol evidence to charge the undisclosed principal where the agent has signed as principal, see the following*:

"There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for

other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, [it] purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal." Park, B., in *Higgins* v. *Senior,* 8 M. & W., p. 844.

"The most plausible explanation which has been attempted pursues the same thought more clearly. It is said that the principal is liable 'because he is taken to have adopted the name of the [agent] as his own, for the purpose of [the] contract.' 2 Smith's Leading Case (8th ed.), 408, note to *Thomson* v. *Davenport.*" Holmes, J., in *Byington* v. *Simpson,* 134 Mass., p. 170.

BORCHERLING *v.* KATZ.

IN THE COURT OF CHANCERY, NEW JERSEY, 1883.

37 New Jersey Equity Reports, 150.

VAN FLEET, V. C.:

This is a novel case. The complainant seeks to hold the defendants for the rent reserved by a lease made by him to other persons than the defendants. The special ground on which he seeks to do this is, that the defendants were the real lessees, that, though the demise was made to other persons, they acted simply as the agents of the defendants, who were the principals in the affair and entitled to the benefit of the demise. The legal principle on which he rests his right to relief, is that which entitles a vendor who, having made a sale to a person whom he believed at the time to be the principal in the transaction, is afterwards discovered to have been the agent of a third person, to recover the price of the goods of the principal, though he has in the meantime debited the agent.

The following summary presents all the important facts: On the 22d of October, 1877, the complainant made a lease, under seal, to Rudolph Heller and William Katz, partners, doing business under the name of Heller & Katz, demising certain premises, situate on Mulberry street, in the city of Newark, for a term of two years and five months from the 1st day of November, 1877, at an annual rent of $840, payable monthly in advance. The lease was executed by both parties. It gave the lessor the right to reenter for the breach of any covenant on the part of the lessees. The lessees covenanted not to underlet, nor to assign the lease, or any part of their term, without the written consent of the lessor. On the 31st day of October, 1877, the defendants, Bernard Katz and Philip Katz, constituted and appointed Heller & Katz their attorneys,

empowering them to carry on and conduct the business then owned by the defendants in the city of Newark, and to do and perform all and every act and thing whatsoever requisite and necessary to be done in carrying on the business. Heller & Katz took possession of the demised premises soon after the commencement of the term, and continued to occupy them, jointly, until December, 1878, when Heller left. Afterwards Katz continued to occupy them alone until April 1st, 1879, when he left. At the time the premises were abandoned there was $220 rent in arrear, which the complainant attempted to collect by distress, but the defendants claimed the property seized, and the complainant surrendered it. This claim by the defendants was, in part at least, false. They now admit that most of the chattels seized belonged to Heller & Katz. The complainant subsequently brought an action at law against the lessees for the rent in arrear, but, on discovering the power of attorney, proceeded no further. He did not know of the existence of the power of attorney until May, 1879, some time after he had commenced his action at law. For the purpose of putting the case in the most favorable form for the complainant, I shall assume that the business carried on on the demised premises was the business of the defendants, and that Heller & Katz were the agents of the defendants when the lease was executed, although the weight of the evidence shows both facts to have been otherwise.

Some of the complainant's legal propositions are so firmly established as to be beyond dispute. There can be no doubt that a principal is bound by the acts of his agent within the authority expressly given to the agent, and also for such acts as are necessary and requisite to be done in order that the agent may accomplish the object of his appointment. It is also true, as a general rule, that where a contract is made by an agent, without disclosing his principal, and the other contracting party afterwards discovers that the person with whom he dealt was not the principal,

but that a third person stood behind him as the real party in interest, he may abandon his right to look to the agent personally, and resort to the principal. And this he may do even when the contract is in writing, and is such as is required by the statute of frauds to be in writing, for, in such case, parol evidence, showing that an additional party is liable, in no way contradicts the written instrument. "It does not deny that it is binding on those whom, on its face, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is, in law, the act of his principal." *Higgins* v. *Senior,* 8 M. & W. 834, 844. Parol evidence is admissible in such cases to charge the principal, but not to discharge the agent. 2 Smith's Lead. Cas. 226. But where an agent makes a lease in his own name, and executes it in his own name, though the rent is reserved to his principal, and all the covenants purport to be made with his principal, the principal cannot maintain an action on it, for the reason that on a deed *inter partes* no person can maintain an action except a party to it. *Berkeley* v. *Hardy,* 5 B. & C. 355; *Sheldon* v. *Dunlap,* 1 Harr. 245.

The complainant puts his right to relief against the defendants, on these legal rules. He justifies his resort to this court in this wise: He insists that by force of the legal rules just stated, his right to hold the defendants for the rent is clear, but that he cannot maintain an action at law against them because they are not parties to the lease. He says he cannot maintain an action for use and occupation, for the statute declares that such action can only be maintained where the agreement for the occupation of the land is not by deed (Rev., p. 570, Sec. 3); he claims, therefore, that his case falls within that principle of equity jurisprudence which declares that where there is a right there ought to be a remedy, and, if the law gives none, it ought to be administered in equity. This conclusion, I think, may be admitted to be sound, provided it is found that the

defendants are subject to the legal principle on which the complainant mainly rests his right to relief. This, in my judgment, is the test question of the case.

Neither the researches of counsel, nor my own, have resulted in the discovery of a precedent for this action. I think it may safely be said that no instance exists in which some other person than the lessee named in a lease, under seal, has been held liable in equity for the rent reserved by the lease, on the ground that he was the undisclosed principal in the transaction, and liable, as such, by force of the rule which renders an unnamed and unknown vendee liable for the price of goods purchased by him through his agent. The only case to which my attention has been directed, which can be regarded as authority for the complainant's position, is *Clavering* v. *Westley*, 3 P. Wms. 402. There the plaintiff made a lease of a coal mine to A for twenty-one years. A then declared a trust of the lease for five persons. These five persons entered into possession, worked the mine, and took its products, but some time after, the lessee becoming insolvent, and the mine unprofitable, they abandoned it. The lessor then brought his bill against the lessee and *cestuis que trust* to compel them to pay the rent in arrear, and also the accruing rent, insisting that though the lease was made to A, yet it being declared by him to be in trust for the five persons, as tenants in common, it was the same thing as if it had been made to them originally. The master of the rolls (Sir Joseph Jekyll) held that the *cestuis que trust* were not liable, and dismissed the bill. His reason was this: That inasmuch as the plaintiff had chosen to let the mine to A alone, and to accept his covenant for the rent, he should be restricted to the security he had voluntarily accepted. Having accepted the covenant of the lessee, his remedies were limited to that. Lord Talbot, on appeal, reversed this decree, and decreed that the lessee was primarily liable, but in case the rent could not be collected of him, then that each of the five *cestuis que trust* should pay one-fifth of the rent in

arrear, and also that which should afterwards accrue. The report of this case, on appeal, is extremely meagre and unsatisfactory. The conclusion of the lord chancellor is simply given, without more. No reasons are given, and we have not even a hint of the legal rule which it was supposed the judgment of the master of the rolls had overlooked or disregarded.

But this case has since been overruled. It is no longer an authority in the court which deceived it; on the contrary, its doctrine has been repudiated. Lord Cranworth, in *Walters* v. *Northern Coal Mining Co.*, 5 De G. M. & G. 629, after expressing regret that the grounds of Lord Talbot's decision are not given, says: "If he is to be taken as laying down a general proposition that whenever a legal lessee is trustee for another, the rent becomes an equitable debt from the *cestui que trust,* to be recovered by bill in this court, I must, with all respect, say that is a proposition to which I cannot assent. I rest my judgment on the ground that no such general principle exists." Lord Cranworth's discussion of the question on which the decision here must turn, is so exhaustive and unanswerable that this case may be decided by a single quotation from his opinion. He says: "The rights of a landlord against those who occupy his land are legal rights, well defined and understood. Where a tenant is holding under a demise at a stipulated rent, the landlord has his remedy by distress or action of debt. If the lessee assigns to another, the landlord has against the assignee, so long as he remains in possession, the same rights which he had against the original tenant. If instead of assigning his interest, the lessee creates a tenancy under himself, then the original landlord may either distrain on the under-tenant, or may bring his action of debt or covenant, as the case may be, against the original lessees. * * * The object of the present bill is to give to the landlord an additional remedy in case the legal lessee is a mere trustee for others, who have in fact occupied the lands, to enable the landlord, in such a case,

to treat the *cestuis que trust* as equitable debtors for the amount of the rent. But I can discover no principle to warrant such a proposition. The relation between the owner of the land and those who occupy it is of a purely legal character. The circumstance that there is a relation of an equitable character subsisting between the lessee and the actual occupier cannot give any equitable rights to one who claims by a title paramount both to the trustee and the *cestui que trust.* Whatever be the relation between the lessee and the occupier, the landlord's rights are unaffected. He has his legal remedy by distress, or he may bring his action against the lessee." The same doctrine, substantially, was enforced by Lord Justices Knight Bruce and Turner, in *Cox* v. *Bishop,* 8 De G. M. & G. 815. An attempt was made there to hold the equitable assignee of a lease for the rent which accrued during the time he was in the actual possession and enjoyment of the demised premises. Lord Justice Knight Bruce said: "They [possession and enjoyment] do not, in my judgment, create a contract between the lessor and the equitable assignee which can give the former a title to the relief prayed against the latter. The possession by itself would not, nor would the equitable assignment by itself, have given the lessor the equitable right which he is here asserting against the lessee; neither, I think, can the union of the two."

It is quite impossible to distinguish these cases from the one under consideration. They are, in all material and essential points, identical, and must all be governed by the same general rules of justice. The fact that the complainant has chosen to describe the relation existing between the defendants and the lessees in this case, as principal and agent, and that in the cases just referred to the relation which existed between the lessees and the persons sought to be charged with the rent was spoken of as trustee and *cestuis que trust,* is without the least significance in legal estimation. The difference is in terms or names, and not in the legal character of the relation. The relation, in prin-

ciple and substance, is the same, whether it is described by one set of terms or the other, and its rights and obligations are the same, whether called by one name or the other. In every instance in which an agent takes title in his own name to property purchased for his principal, he makes himself, in equity, the trustee of his principal. And if, in the transaction under consideration, Heller & Katz were the agents of the defendants, then in taking the lease in their own names they made themselves the trustees of the defendants, and the more accurate description of the relation of the parties, in that case, would be trustee and *cestui que trust,* rather than principal and agent.

The precedents are against the complainant. I think reason is also against him. No reason of justice or policy can be suggested why landlords should have the additional remedy sought in this case. A creditor of that kind is already highly favored by the law. He may distrain either against the tenant or the under-tenant; if the person in possession fails or refuses to pay the rent in arrear, the landlord may dispossess him, and thus recover the possession of the premises, and in addition, he may use the only means within the reach of ordinary creditors—bring his action at law. If with these ample remedies at his command he fails to secure the payment of his rent, it may be safely concluded it is not for the want of adequate remedies.

The complainant's bill must be dismissed, with costs.[1]

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[1] *Accord*: Briggs *v.* Partridge, 64 N. Y. 357, 1876;
Kiersted *v.* The Orange and Alexander Railroad Co., 69 N. Y. 343, 1877.
Stanger *v.* Warren, 91 Tex. 472, 1898. (A statute in the jurisdiction provided: "No private seal or scroll shall be necessary to the validity of any contract, bond or conveyance, whether respecting real or personal property, * * * nor shall the addition or omission of a seal or scroll in any way affect the force and effect of the same." A owned land. By an unsealed indenture A conveyed land to B, B in words covenanting to pay purchase price. *Held,* that A could not proceed against C, B's undisclosed principal, because the statute did not change the nature of a deed or the effect of promises recited therein.)
Compare the following case in which the principal was known to the plaintiff at the time of contract.

In re International Contract Co. 6 Ch. App. Cas. 525, 1871. (A was the owner of two concessions granted by the Peruvian Government. B stated that he wanted to buy for company. B was managing director of the company. A consigned the concession to B and B covenanted to pay the price. The company paid A a part of the price. An order was made for the winding up of the company, and A carried in a claim on the company for the balance due on B's covenant. James, L. J.: "I am of opinion that the appellant's case entirely fails * * * There is an assignment of property to a trustee, who enters into covenant with an assignor. In such a case the assignor has no equity to proceed against the *cestui que trust.* The appeal must be dismissed with costs.")

CHAPTER III.

LIABILITY OF OWNER OF PROPERTY NOT USED IN BUSINESS.

SIMPSON *v.* SEAVEY.

IN THE SUPREME JUDICIAL COURT OF MAINE, 1831.

8 *Maine Reports*, 138.

This was an action on the case, in which the plaintiffs alleged that they were owners of a saw-mill on the East Machias river, below a saw-mill of the defendants; and that the latter, having erected two lath-mills within their own saw-mill, threw their lath-edgings into the river, which being carried by the current into the plaintiff's flume, choked and obstructed his gate-way, and diverted the water from his mill, &c.

MELLEN, C. J.[1] By inspection of the writ it appears that whatever injury the plaintiffs have sustained, has been occasioned by the two lath-mills, which have been made within the frame of the saw-mill Unity, and by the throwing of lath-edgings from them into the river, which floated down and obstructed the plaintiff's saw-mill. By the reported statement of facts it appears that Dickenson was a part owner of the saw-mill Unity, during the time mentioned in the will; yet there is no proof that he owned any part of either of the lath-mills above mentioned; but it does appear that, during the said period, Dickenson occupied no part of said lath-mills; but one was wholly owned and occupied and

[1] Only that part of the opinion which relates to the liability of the defendant Dickenson is printed.

improved by Pope, Talbot and Seavey, three of the defendants; and the other was built and owned by the deceased Hovey. On these facts, we see no privity, in respect to the lath-mill, between Dickenson and the other three surviving defendants, which can implicate him in the transactions complained of by the plaintiffs, and subject him to damages; of course he is considered by the court as not guilty, and judgment is to be entered in his favor for his legal costs.

BROOKS *v.* HARRIS.

IN THE SUPREME COURT OF ALABAMA, 1847.

12 Alabama Reports, 555.

Assumpsit by Charles A. Kelly, against the plaintiffs in error, on the following instrument: "Mobile, 11 Oct. 1841. Due Charles A. Kelly, or bearer, three hundred and thirty dollars, 29-100, for work and labor done, on steamboat 'Jewess.'

(Signed) for steamboat 'Jewess', and owners.

ALPHONSO BROOKS."

Upon which the following declaration was filed:

Charles A. Kelly, &c., complains of Alphonso Brooks, and Levin J. Wilson, joint owners of the steamboat called the "Jewess," in custody, &c. For that, &c., on the 11th October, 1841, the said defendant, Alphonso Brooks, for himself and the said Levin J. Wilson, joint owners of the said steamboat, made his certain due bill in writing, bearing date, &c.; and thereby, and then and there, for himself and the said Wilson, as owners of the said steamboat, promised to pay the said plaintiff, the said sum of $330.29. By means whereof, &c. There was also a count for work and labor.

A judgment was rendered in favor of the plaintiff on the verdict of a jury.

A bill of exceptions found in the record, discloses, that the plaintiff offered evidence, tending to prove, that Wilson was an owner of the steamboat, prior to the date of the due bill, and the defendant, Wilson, having offered no evidence, except such as tended to show he was not a joint owner of the boat, the court charged the jury, that defendants being sued on a due bill, expressly made the foundation of the action, without a plea denying under oath the instrument declared on, it is evidence of the debt it expresses. And if

there was sufficient proof, that Wilson was part owner, at the time the due bill was given, this, with the due bill, will bind him upon the pleadings.[1]

ORMOND, J.: The due bill upon which the action is founded, was not executed by the defendant, Wilson, in person, and to bring it within the influence of the statute, making the instrument sued on, evidence of the debt, or duty, for which it was given, unless its execution is denied by a sworn plea, it must be alledged in the declaration, to have been executed by one, having authority to bind him. This is supposed to be the effect of the allegation here, but in our opinion no such effect can be accorded to it. It deduces the right of Brooks, to bind Wilson, from the fact that Wilson is a part owner with Brooks of the steamboat. The language of the declaration, is, that the due bill was made by Brooks, acting for himself, and as joint owner with Wilson, of the boat. But one part owner has not the power to charge another, by contracting debts in his name, and there is no allegation, that Brooks had authority, as agent of Wilson, to bind him by the execution of a note in his name. In Childress *v.* Miller, 4 Ala. Rep. 447, an attempt was made to charge the owners of a steamboat, on a due bill made by the clerk of the boat, "for steamboat 'Choctaw,' and owners." It was held that these words, did not in themselves, import an authority to bind the owners, and that as the clerk of the boat as such, had not the right to admit an indebtedness on the part of the owners, the action could not be maintained. This is a decision expressly in point, as the statute applies only to such instruments, as are the foundation of the action; and this not being signed by the party sought to be charged, could only be obligatory on him, by being executed in his name, by one duly authorized to bind him.

Let the judgment be reversed and the cause remanded.[2]

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[1] Only so much of the facts and opinion as relates to the correctness of this charge is printed.

[2] *Compare: Merrill* v. *Berkshire*, 11 Pick. 269, 1831. (A and B were tenants in common. Part of the land was taken by the county for a

highway and allowances made by the commissioners. B signified his assent to what the commissioners had done. *Held,* that B's assent did not estop A from petitioning for a jury to make alterations in the location of the highway, and to increase the allowances made by the commissioners.)

Pearis v. *Covilland,* 6 Cal. 617, 1855. (A, B *et al.* were tenants in common. They made a joint contract for the sale of land to D, D giving his note. On the maturity of the note payment was demanded and refused. More than three years later D tendered the amount of the note to A and demanded deed. A refused. D made the same tender to B. B accepted the money and gave D a memorandum reciting that he, D, was entitled to a deed. D brought a bill for specific performance against A, B *et al.* Refused, except as to B's interest, one of the grounds of the refusal being that D had no power to accept the purchase money and promise a deed so as to bind the other owners of the property.)

Thurston v. *Horton,* 82 Mass. 274, 1860. (C ordered an engine from A, which was to be erected on land which A thought belonged to C, but which in fact was the property of B. When the engine was being installed B stood by and said it was satisfactory. A sued B and C for the price of the engine. Hoar, J., instructed the jury, that the above recited facts were not sufficient to maintain an action against B. On appeal affirmed.)

St. Paul's Church v. *Ford,* 34 Barb. 16, 1860. (A, B and C were tenants in common of a pew, and jointly and severally liable to pay rent. Each separately and at different times signed a paper agreeing to a readjustment of the rent. The church readjusted the rent, and sued A, B and C jointly for the increased rent. *Held,* the defendants were not jointly liable from the mere fact of their co-ownership, as each had merely agreed separately to an increased assessment on his undivided share.)

Morrison v. *Clark,* 89 Me. 103, 1896. (A and B were tenants in common of a reasonable and convenient way across C's lot. A adopted and used a right of way on the east side of C's lot. C brought an action of trespass against A, and had judgment, on the ground that A had agreed to use a way on the west side of C's lot. A used the way on the east side again. C sued A again in trespass. A justified as licensee of his wife, B. *Held,* that the former judgment against A was not conclusive against him in this case, as B had a right to the determination of a jury of the question whether the eastern way was or was not a reasonable way.)

MARSH *v.* HAND.

IN THE SUPREME COURT OF NEW YORK, 1886.

40 *Hun's Reports*, 339.

Appeal from a judgment in favor of the plaintiff, entered at the Broome Circuit upon the verdict of a jury, and from an order denying a motion for a new trial made upon a case and exception.

The plaintiff, in April, 1884, resided in the town of Binghamton, upon a farm adjoining premises occupied by the defendant Cumber, which last mentioned premises were owned by one Stephen D. Hand at the time of his death, and were occupied by said Cumber, under an agreement with the defendants Walter M. Hand and George F. Hand, as executors of the last will and testament of said Stephen D. Hand. The defendant Cumber took possession of the premises April 3, 1882, and continued in possession under extensions of the same contract up to the time of the trial. The defendants Hand left a quantity of stock on the farm at the time that Cumber took possession; and some months after, and in November, 1882, Cumber exchanged the ram upon the place for another, which exchange was made without the knowledge of the Hands, nor did they ever know of such exchange, or that the ram was on the place, until after the injuries complained of by the plaintiff.

April 1, 1884, this ram went upon the premises of plaintiff, and while upon his premises butted plaintiff and inflicted injuries upon him, and this action was brought to recover for the injuries so received.

It is conceded, for the purposes of this appeal, that the defendant Cumber knew the ram in question to be vicious, and that the other defendants did not know it.

BOARDMAN, J.: The plaintiff recovered for injuries in-

flicted upon him by a vicious ram, which had trespassed upon his premises from lands owned by defendants Hand, but occupied by defendant Cumber under a peculiar contract. It is conceded that Cumber knew the ram was vicious and that the defendants who appeal, the Hands, had no such knowledge prior to plaintiff's injury, unless Cumber's knowledge is to be imputed to them. We will refer to the contract set out in the case for the language used, without repeating the same here.

The learned justice at Special Term holds, that the Hands, by virtue of the contract, remain the owners of the sheep left on the place when Cumber took it—that it was not a sale of the sheep to Cumber. We are inclined to accept that as a just conclusion, though there are features in the contract leading to a different result, notably where it provides that Cumber "shall leave upon the farm as large a quantity of hay and stock, and as good as he found on taking possession, or pay the Hands the cash value of the same." This language indicates an absolute right of disposition of the stock and but for other clauses of the contract we should so hold. However that may be, Cumber exchanged the ram left on the place by the Hands, without their knowledge and consent, for the vicious ram which did the injury. So far as appears the Hands never knew of such exchange prior to plaintiff's injury.

If the title to the sheep remained in the Hands after Cumber went into the possession of the farm, it has not been divested by Cumber's act in making the exchange. The contract does not give Cumber any right to sell or convert the property of the Hands and they have never authorized or ratified Cumber's act. Cumber may be liable under the final clause of the contract above quoted for the value of the ram disposed of, unless he substitutes therefor something of equal value, which the Hands choose to accept as equally good. Until the end of the contract and such acceptance the vicious ram so acquired remained the property of Cumber. He kept it on the farm in and for the joint benefit and interest

of the defendants. It was there for use, and though owned by Cumber, the defendants without knowing it had an interest in it and in its being kept there. It was not kept on the farm at the expense of the farm for the benefit of Cumber or others, but for their joint benefit. If this view of the case be correct, the defendants Hand were not the owners or possessors of this vicious ram and were not responsible for injuries done by him through Cumber's negligence.

If it could be held that the defendants were tenants in common of the vicious ram, it seems to us that the Hands could not be held responsible for the negligence of Cumber who was in the sole possession, and had the right to such possession until the end of his year. (*Bowman* v. *Travis,* 54 N. Y., 640.)

The cases cited by the learned judge in his opinion denying a new trial do not seem to sustain his views in their application to the facts in this case. The case of *Ward* v. *Warren* (82 N. Y., 265), holds that the knowledge of one tenant in common in the occupation of land, of the use of an easement over it, is knowledge in and will bind all his co-tenants. In *Leggett* v. *Hyde* (58 N. Y., 272), on the facts one was held to be a partner and liable for co-partnership debts. In *Roberts* v. *Johnson* (58 N. Y., 613), the employer was held liable for the negligence of his employee, a stage driver, whereby a passenger was injured. In *Strohcr* v. *Elting* (97 N. Y., 102), the parties had a contract relation making in the process of its execution each the agent of the other, and each liable for the negligence of the other while engaged in the common enterprise. In *Champion* v. *Bostwick* (18 Wend., 175), the defendants were held to be co-partners and liable as such for negligent injury. Except the first case, which does not apply to a cause of action arising out of negligence, none of them lays down any rule of law about tenants in common.

It is not possible to hold that the defendants were partners in the ownership of the original sheep or the vicious one. It was not so held in the court below. Nor can we

see how there could be an agency to do a wrong, or, by negligence of the agent, permit a wrong to be done for which his principal should be bound, where the agent was not at the time engaged in the prosecution of his principal's business. Undoubtedly the act of an agent within the scope of his authority, and while engaged in his principal's business, would bind the principal and make him liable for results. (*Rounds* v. *Del., Lack. and West. R. R. Co.*, 64 N. Y., 129.) But in no such sense was Cumber the agent of the Hands. He had, during the existence of the contract, the absolute control and possession of the stock. The Hands could not deprive him of it. They had no power to avoid the contract or disturb Cumber's possession. How could he then be deemed their agent, or why should they be liable for his negligence or wrong? How are his acts to be deemed the acts of the Hands to the extent of making them liable for his wrong, or imputing to them his knowledge so as to make them liable for the wrong? (*Van Slyck* v. *Snell*, 6 Lans., 299; *King* v. *N. Y. C. and H. R. R. R. Co.*, 66 N. Y., 181.) For these reasons we think the Hands were not liable to the plaintiff for the injury he suffered.

I do not find in the case any evidence that the sheep were wrongfully upon the plaintiff's farm by reason of any negligence of the defendants or either of them. Unless the sheep were unlawfully there a recovery cannot be sustained against the defendants Hand without proof of a *scienter*. (*Van Leuven* v. *Lyke*, 1 Comst., 515; Moak Underhill on Torts, 303.) We do not think that any such evidence has been given or that the Hands are made liable by reason of any knowledge possessed by Cumber. Little importance, however, is attached to this feature of the case, since it seems to have been assumed during the trial that the sheep were trespassing on plaintiff's farm at the time of the injury, and no such specific objection was taken to the recovery. The right of Cumber to make the exchange of rams is denied by the second ground taken on the motion for nonsuit.

The judgment and order should be reversed, and a new trial granted, with costs to abide the event.

HARDIN, P. J., and FOLLETT, J., concurred.

Judgment and order reversed, and a new trial ordered, with costs to abide the event.

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[1]*Compare: Bernard* v. *Aaron*, 11 C. B., n. s. 889, 1862. (B and C were joint owners of a ship. C rented B's share in ship for one-third gross profits. A was injured by a defect in some tackle on the ship. A sued B and C for the injury and obtained a verdict. Rule to set aside verdict as to C made absolute. Williams, J.: "It is not disputed, that if the facts be taken to be that [C] hired [B's] share of the ship, at a rent of one-third of its gross earnings, [B] is, in that case, not liable for the negligence of the master, who, under these circumstances, is exclusively the servant of Aaron.")

HEETER *v.* LYON.

IN THE SUPERIOR COURT OF PENNSYLVANIA, 1897.

5 *Pennsylvania Superior Court Reports*, 260.

Assumpsit to recover price of the drilling of a well. Before Greer, P. J.

The facts sufficiently appear in the opinion of the Court.

Verdict for plaintiff for $217.14. Defendant appealed.

Errors assigned were: (1) In answering the defendant's first point, which point and answer are as follows: "Plaintiff having entered into a written contract with all the joint owners in the lease except defendant for a specific sum, he cannot maintain the suit against the defendant for a pro rata share of the expenses or contract price as laid in the original contract, it not being divisible. Answer: Refused." (2) In answering the defendant's second point, which point and answer are as follows: "2. Plaintiff in this action being a joint owner or tenant in common with defendant, cannot maintain assumpsit without an express contract. Answer: Affirmed. The plaintiff cannot recover without a contract; this is fully explained in the general charge." (3) In answering the defendant's third point, which point and answer are as follows: "3. From all the evidence in this case the verdict should be for the defendant. Answer: Refused." [1]

ORLADY, J.: The defendant in this case was the owner of an undivided one-eighth interest in a leasehold for oil and gas purposes in Butler county. In the improvement of the property, it was agreed by all interested therein save the defendant (and plaintiff contends with him also), that a new well should be drilled on the premises, the cost of which

[1] The argument of counsel for appellant is omitted.

was to be $2,600. This sum was to be paid to the plaintiff by the owners, in proportion to their respective interests. All of the owners, save the defendant, went on the ground and fixed the location of the new well and directed the manner in which it was to be drilled. The plaintiff contends that the matter was subsequently brought to the attention of the defendant, who ratified the contract, and agreed to pay his share of the $2,600, and on the faith of this promise, the work was done in a manner to which there was no objection, and the plaintiff brings this action to recover from the defendant his proportionate share of the cost. The whole question was one of fact, and the right of one joint tenant or tenant in common to recover in assumpsit, for property improvement without an express contract from one equally interested, does not apply in this case. It was not contended that the work was done improperly. The defendant denied authorizing it. The plaintiff asserted that he had full authority from him to do the work, and while the others signed a written contract, it was at a time when the work was nearly completed, and the defendant's objection to signing the writing, was only because he was not satisfied with the location adopted by the others interested in the title.

The question was fairly submitted to the jury, who were told "if there was no agreement or consent of Mr. Lyon with Mr. Heeter, so to drill this well, then the verdict must be for the defendant, because the majority consenting to it would not bind him; but if the well was drilled, which is admitted, and if its drilling would have benefited Mr. Lyon and it is admtited it would have, then if Mr. Lyon consented to its drilling, etc., joining in with the others although not in writing, then he would be liable to pay his share, whatever that share is reasonably worth." This was a fair submission of the only question in controversy, to the only tribunal authorized to dispose of it.

The assignments of error are overruled and the judgment is affirmed.

CHAPTER IV.

LIABILITY OF SOLE OWNER OF PROPERTY USED IN BUSINESS.

EDMUNDS *v.* BUSHELL.

IN THE COURT OF QUEEN'S BENCH, 1865.

Law Reports, 1 Court of Queen's Bench, 97.

This was an action commenced under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict., c. 67). The defendant Bushell had not appeared, and judgment had been signed against him.

The declaration was against Jones, as acceptor of a bill for 184*l.*, dated 1st of February, 1865, at four months after date, drawn by one Britten to his order, and indorsed by him to Taylor, and by Taylor to the Birmingham and Midland Banking Company, of which the plaintiff was the public officer.

Plea, that the defendant Jones did not accept the bill.

The cause was tried at the last Surrey Summer Assizes, before Crompton, J., and the following facts were proved. The defendant Jones was a wholesale straw hat manufacturer, who carried on business at Luton, in Bedfordshire, and also until May, 1865, had a branch establishment in Milk Street, London. The business in London was carried on under the name of "Bushell & Co." By an agreement between the two defendants it was agreed that Bushell should enter Jones's service as manager of the establishment in London, and that he should be paid for his services quarterly an amount equal to one-half of the net

profit to be derived from the business carried on in London. Jones opened an account in the name of "Bushell & Co.," at the London and County Bank, into which account Bushell was to pay all sums which he received to the amount of 5*l*. He had authority from Jones to draw cheques in the name of Bushell & Co. for the purposes of the business, but he had no authority to draw or accept bills. In July, 1864, Bushell accepted a bill in the name of Bushell & Co., dated 9th of April, 1864, drawn upon Bushell & Co., and made payable at the London and County Bank. This bill was paid at maturity, and Jones did not know of the transaction until he saw the amount entered in his pass-book as a payment. Jones then told Bushell he had no authority to accept bills, and forbade him to do so. Bushell, however, accepted three other bills, dated in November and December, 1864, which fell due in February and March following, and were paid at the London and County Bank, and charged to Jones. These four bills were given to persons with whom "Bushell & Co." had dealings in the way of business. In consequence of these irregularities Bushell was dismissed in May, 1865.

The acceptance to the bill sued upon was in the style of "Bushell & Co.," and was proved to be in the handwriting of Bushell. The bill was taken by the banking company from Taylor, a customer, for a good consideration, the company knowing nothing of Bushell & Co.

The jury found a verdict for the plaintiff, for 185*l*. 17*s*., leave being reserved to move to enter a verdict for the defendant, if the Court should be of opinion that there was no reasonable evidence of the defendant Jones's liability.[1]

Cockburn, C. J. In this case there ought to be no rule. The defendant carried on business both at Luton and in London. In London the business was carried on in the name of Bushell & Co., Jones at the same time employ-

[1] The argument of counsel for the rule is omitted.

ing Bushell as his manager; Bushell was therefore the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business. That being so the case falls within the well-established principle, that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary as incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and Bushell cannot be divested of the apparent authority as against third persons by a secret reservation. I think Jones was properly held to be liable on the bill.[2]

Rule refused.

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[2] The concurring opinions of Mellor and Shee, JJ., are omitted.

WATTEAU *v.* FENWICK.

IN THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE, 1893.

Law Reports [1893], 1 *Queen's Bench Division*, 346.

Appeal from the decision of the county court judge of Middlesborough.

From the evidence it appeared that one Humble had carried on business at a beerhouse called the Victoria Hotel, at Stockton-on-Tees, which business he had transferred to the defendants, a firm of brewers, some years before the present action. After the transfer of the business, Humble remained as defendants' manager; but the license was always taken out in Humble's name, and his name was painted over the door. Under the terms of the agreement made between Humble and the defendants, the former had no authority to buy any goods for the business except bottled ales and mineral waters; all other goods required were to be supplied by the defendants themselves. The action was brought to recover the price of goods delivered at the Victoria Hotel over some years, for which it was admitted that the plaintiff gave credit to Humble only: they consisted of cigars, bovril, and other articles. The learned judge allowed the claim for the cigars and bovril only, and gave judgment for the plaintiff for *22l.* 12*s.* 6*d.* The defendants appealed.

1892. Nov. 19. Finlay, Q. C. (Scott Fox, with him), for the defendants. The decision of the county court judge was wrong. The liability of a principal for the acts of his agent, done contrary to his secret instructions, depends upon his holding him out as his agent—that is, upon the agent being clothed with an apparent authority to act for his principal. Where, therefore, a man carries on business in his own name through a manager, he holds out his own credit, and would be liable for goods supplied even

where the manager exceeded his authority. But where, as in the present case, there is no holding out by the principal, but the business is carried on in the agent's name and the goods are supplied on his credit, a person wishing to go behind the agent and make the principal liable must shew an agency in fact.

[Lord Coleridge, C. J. Cannot you, in such a case, sue the undisclosed principal on discovering him?]

Only where the act done by the agent is within the scope of his agency; not where there has been an excess of authority. Where any one has been held out by the principal as his agent, there is a contract with the principal by estoppel, however much the agent may have exceeded his authority; where there has been no holding out, proof must be given of an agency in fact in order to make the principal liable.[1]

Dec. 12. Lord Coleridge, C. J. The judgment which I am about to read has been written by my brother Wills, and I entirely concur in it.

Wills, J. The plaintiff sues the defendants for the price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept, not by the defendants, but by a person named Humble, whose name was over the door. The plaintiff gave credit to Humble, and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble into it to manage it for them, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was

[1] The argument of council for the plaintiff is omitted.

the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

But in the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice, and acted upon by the learned county court judge, appears to be identical with that enunciated in the judgments of Cockburn, C. J., and Mellor, J., in *Edmunds* v. *Bushell,* the circumstances of which case, though not identical with those of the present, come very near to them. There was no holding out, as the plaintiff knew nothing of the defendant. I appreciate the distinction drawn by Mr. Finlay in his argument, but the principle laid down in the judgments referred to, if correct, abundantly covers the present case. I cannot find that any doubt has ever been expressed that it is correct, and I think it is right, and that very mischievous consequences would often result if that principle were not upheld.

Appeal dismissed.

POPE *v.* MEADOW SPRING DISTILLING COMPANY.

IN THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, 1884.

20 Federal Reporter, 35.

DYER, J., (charging jury.) These are two actions, one brought by Charles Pope and the other by D. W. Ryan, against the Meadow Spring Distilling Company, to recover in the one case the purchase price of a certain quantity of malt, and in the other case the purchase price of a quantity of barrels, which it is alleged came to the possession of the defendant company through a sale of the same, in the first instance, to one Leopold Wirth, and of which property, it is alleged, the defendant had the use and benefit. The complaint in the case of Pope charges that in August, 1883, Leopold Wirth, who was the president of the defendant company ordered of the plaintiff, who was a maltster in Chicago, two car-loads of malt suitable for use in a distillery, and the plaintiff Pope, at the request of Wirth, shipped to him such two car-loads of malt on the twenty-eighth and twenty-ninth days of August, 1883; that the same were of the value of $1,255.78; that Wirth made the order and request for the malt for the use and benefit, and with the knowledge and on behalf, of the defendant, and for the purpose of getting the same into the possession of the defendant; that the defendant company realized the whole benefit and advantage of the purchase, and received the malt in pursuance of the shipment by the plaintiff, and used the same, and became thereby indebted to the plaintiff in the amount of the purchase price, $1,255.78. In the case of Ryan, the same state of facts and grounds of alleged liability are stated, except that the property described consisted of three carloads of barrels, the value and purchase price

of which are alleged to have been $775.25, which is the amount sought to be recovered by the plaintiff Ryan.

It is undisputed that the plaintiffs in the several actions, at the time they sold the property in question, made the sales on the individual credit of Wirth, and shipped the property to him as the purchaser and personal consignee thereof, and respectively received and accepted his individual acceptances for the purchase price, which acceptances were ultimately not paid. It seems that at the time of these transactions the Meadow Spring Distilling Company was a corporation owning and operating a newly-constructed distillery in this city, of which corporation Leopold Wirth was the president, and of which, in the conduct of its business, William Bergenthal was the general manager. It is claimed by the plaintiffs, in their respective cases, that immediately after the arrival of the malt and barrels in Milwaukee, the same were removed to the distillery of the defendant company, and that the defendant had the full use and benefit of the property in its business. The theory of the plaintiffs is that although Wirth negotiated for and ordered the malt and barrels in question in his own name and on his individual credit, he in fact made the purchase for the use and benefit of the defendant company; that the property was purchased to be used at the distillery of the defendant, and on behalf and with the knowledge of the company, and that the defendant in fact had the use and received the whole benefit of the property, and therefore ought to pay, and in law became liable to pay, for the same. The claim of the defendant in both cases is that the purchases were made by Leopold Wirth on his own account, for his own use, and on his sole credit; that the purchases were not made by him as an agent; that he had no authority so to act for the defendant; that the defendant company at the time had no knowledge of the transactions; that the purchases were not originally made for its use and benefit; that it had no connection therewith, and did not authorize the same, and that subsequently, after Wirth had become the owner of

the property in his own right, it purchased the malt and barrels from him as a subsequent and independent transaction, and paid him therefor; that, therefore, it is under no liability to the plaintiffs.

In submitting the cases to you, gentlemen, the Court will not enter upon any discussion of the testimony. * * * It is the law that where goods are sold to a person who is in fact an agent of another, and on the credit of such person, but without knowledge of the agency on the part of the seller, the latter has the right to make the principal his debtor on discovering him; and the fact that he may have taken the note or acceptance of such buyer for the goods before discovering the principal, will not affect his right to pursue the real principal. So, too, if the party making the purchase in fact purchases the property, not for himself, but for the use and benefit of a third party, and if such third party, knowing of such purchase, takes the property and appropriates it to his own use and benefit, he is liable for the value thereof to the seller, although the seller may not have known, when he made the sale, that such third party was the *real* party in interest, and may have understood at the time that he was making the sale to the party with whom he directly dealt, and may have made the sale on the credit of such party. It is also a principle of law that where the purchaser of goods upon credit is known to the seller to be an agent of a known principal, and the seller with such knowledge gives exclusive credit to the agent by taking his note or acceptance for the goods, the agent alone is responsible to the seller.

Applying these principles to this case, if you should find that Wirth, when he purchased the malt and barrels in question, was in fact the agent of the defendant company in making the purchase; that he purchased the property for the defendant, and for its use and benefit; and that the plaintiffs were at the time ignorant of such agency,—then, on discovery that the defendant was the real principal in the transactions, the plaintiffs had the right to assert their claims

against the defendant, and, upon such state of facts being established, they are entitled to recover from the defendant the value of the property so sold, although they took the personal acceptances of Wirth for the property. Or if you should find that, although Wirth had no original authority to make the purchases, he did in fact purchase the malt and barrels for the use and benefit of the defendant, and on its behalf, and that the defendant company, by its president and general manager, knew of such purchase, and with this knowledge received the property, and had the use and benefit of it, then the plaintiffs are entitled to recover, although they may not have known, when they made the sales, that the defendant was the real party in interest, and may have understood at the time that they were selling to Wirth, and, in ignorance of the real party in interest, may have taken his acceptances for the property. But if Wirth was the autorized agent of the defendant in the purchase of the property, and if the plaintiffs knew such to be the fact, and knew the Meadow Spring Distilling Company to be his principal, and to be liable on the purchases, and the property was sold on the exclusive credit of Wirth, the plaintiffs electing to trust him and not the defendant company, then the plaintiffs are not entitled to recover. Further, if Wirth was not the authorized agent of the defendant, and did not purchase the malt and barrels for the use and benefit of the defendant, or on its behalf, but purchased them for himself, in his own individual right, and on his own account, then he became the owner of the property, and was solely liable therefor to the plaintiffs, and in that event he would have the right to sell the same to the defendant, or any other person; and if you should find such to be the state of the case, your verdict should be for the defendant.[1]

Verdict for plaintiffs.

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[1] The Court's discussion of the evidence is omitted.

CHAPTER V.

PARTNER'S POWER TO SUBJECT HIS COPARTNER TO LIABILITY.

SECTION 1. — LIABILITY ON CONTRACT—THE CREATION OF A PARTNERSHIP.

GRACE *v.* SMITH.

IN THE COURT OF COMMON PLEAS, 1776.

2 William Blackstone's Reports, 998.

Assumpsit for Goods sold and delivered. On Trial at the Sittings after last Term, Verdict for the Defendant; and now *Davy* moved for a new Trial; the Verdict, as he said, being contrary to Law and Evidence.

De Grey Chief Justice reported, that this was an Action brought against *Smith* alone, as a secret Partner with one *Robinson* [vide *Abbot* and *Smith. P.* 14 *Geo.* 3. p. 947. *devant*] to whom the Goods were delivered, and who became Bankrupt in 1770. That on the 30th of *March* 1767, *Smith* and *Robinson* entered into Partnership for seven Years, but in the *November* afterwards some Disputes arising, they agreed to dissolve the Partnership. The Articles were not cancelled; but the Dissolution was open and notorious, and was notified to the Public on the 17th of *November* 1767. The Terms of the Dissolution were, that all the Stock in Trade and Debts due to the Partnership should be carried to the Account of *Robinson* only. That *Smith* was to have back 4200*l.* which he brought into the Trade, and 1000*l.* for the Profits then accrued, since the Commencement of the Partnership: That *Smith* was to lend *Robinson* 4000*l.* part of this 5200*l.* or let it remain in

his Hands for seven Years, at five *per Cent.* Interest, and an Annuity of 300*l*, *per Annum,* for the same seven Years. For all which *Robinson* gave Bond to *Smith.* In *June* 1768, *Robinson* advanced to *Smith* 600*l.* for two Years Payment of the Annuity and other Sums by way of Interest, and Gratuities, and other large Sums at different Times to enable him to pay the Partnership Debts, *Smith* having agreed to receive all that was due to the Partnership, and to pay its Debts, but at the Hazard of *Robinson.* That on the 1st of *August* 1768, the Demands of *Smith* were all liquidated and consolidated into one—*viz.* 5200*l,* due to Him on the Dissolution of the Partnership 1500*l.* for the remaining five Years of the Annuity, and 300*l.* for *Smith's* Share of a Ship: in all 7000*l.* for which *Robinson* gave a Bond to *Smith.* That on the 22d of *August* 1769 an Assignment was made of all *Robinson's* Effects to secure the Balance then due to *Smith,* which was stated to be 10,000*l.* Soon after the Commission was awarded.

Davy for the Plaintiff insisted, that the Agreement between *Robinson* and *Smith* was either a secret Continuance of the old Partnership, or a secret Commencement of a new one; being for the retiring Partner to leave his Money in the visible Partner's Hands, in order to carry on his Trade; and to receive for it twelve and an half *per Cent.* Profit, which could not be fairly done, unless it be understood to arise from the Profits of the Trade. And that he ought therefore to be considered as a secret Partner. And he relied much on a Cafe of *Bloxham* and *Fourdrinier* against *Pell* and *Brooke,* tried at the same Sittings (7th of *March* 1775) before Lord *Mansfield* in the *King's Bench* as in point. "This was also a Partnership for seven Years between *Brooke* and *Pell;* but at the End of one Year agreed to be dissolved, but no express Dissolution was had. The Agreement recited, that *Brooke* being desirous to have the Profits of the Trade to himself, and *Pell* being desirous to relinquish his Right to the Trade and Profits, it was agreed, that *Brooke* should give *Pell* a Bond for 2485*l,*

which *Pell* had brought into the Trade with Interest at five *per Cent,* which was accordingly done. And it was farther agreed, that *Brooke* should pay to *Pell* 200*l. per Annum* for six Years, if *Brooke* so long lived, as in lieu of the Profits of the Trade; and *Brooke* covenants, that *Pell* should have free Liberty to inspect his Books. *Brooke* became a Bankrupt before any thing was paid to *Pell.* And this Action being brought for a Debt incurred by *Brooke* in the Course of Trade, Lord *Mansfield* held that *Pell* was a secret Partner. This was a Device to make more than legal Interest of Money, and if it was not a Partnership it was a Crime. And it shall not lie in the Defendant *Pell's* Mouth to say, It is Usury, and not a Partnership."

Grofe and *Adair* for the Defendant argued, that the present Case is very distinguishable from that of *Bloxham* and *Pell. Pell* was to be paid out of the Profits of the Trade, as appears from the Covenant to inspect the Books, which else would be useless. His Annuity was expressly given, as and in lieu of those Profits. It was contingent in another View, as it depended on the Life of *Brooke,* by whom those Profits were to be made. In our Case the Annuity is certain, not casual; it does not depend on carrying on the Trade, nor to cease when that is left off, but is due out of the Estate of *Robinson.* It is not a necessary Dilemma, that it must be either Usury or Partnership. It may be, and probably was, a Premium for the Goodwill of the Trade. Two thousand Guineas is no uncommon Price for turning over the Profits of a Trade so beneficial, that it appears to have been rated at 1000*l.* to each Partner in the Space of less than eight Months. And whether that Sum is agreed to be paid at once, or by seven Installments, it is the same Thing. Besides, whether there be or be not a secret constructive Partnership, is a Question proper for a Jury, who have here decided it on Consideration of all the Circumstances.

De Grey Chief Justice.

The only Question is, what constitutes a secret Partner? Every Man who has a Share of the Profits of a Trade, ought also to bear his Share of the Loss. And if any one takes Part of the Profit, he takes a Part of that Fund on which the Creditor of the Trader relies for his Payment. If any one advances or lends Money to a Trader, it is only lent on his general personal Security. It is no specific Lien upon the Profits of the Trade, and yet the Lender is generally interested in those Profits; he relies on them for Repayment. And there is no Difference whether that Money be *lent de novo,* or *left behind* in Trade by one of the Partners who retires. And whether the Terms of that Loan be kind or harsh, makes also no manner of Difference. I think the true Criterion is, to enquire whether *Smith* agreed to share the Profits of the Trade with *Robinson,* or whether he only relied on those Profits, as a Fund of Payment: A Distinction not more nice than usually occurs in Questions of Trade or Usury. The Jury have said this is not payable out of the Profits; and I think there is no Foundation for granting a new Trial.

Gould Justice, same Opinion.

Blackstone Justice, same Opinion. I think the true Criterion (when Money is advanced to a Trader) is to consider whether the Profit or Premium is certain and defined, or casual, indefinite and depending on the Accidents of Trade. In the former Case it is a *Loan* (whether usurious or not, is not Material to the present Question) in the latter a *Partnership.* The Hazard of Loss and Profit is not equal and reciprocal, if the Lender can receive only a limited Sum for the Profits of his Loan, and yet is made liable to all the Losses, all the Debts contracted in the Trade, to any Amount.

Nares Justice, same Opinion.

Rule discharged.[1]

[1] *Compare: Hoare* v. *Dawes,* 1 Douglas, 371, 1780. (B, C, D *et al.*

separately employed A to buy and sell tea. A, in executing the orders, purchased one lot of tea; two-sixteenths for B and the rest for himself and the others in different amounts according to the orders he had received. B, C, D *et al.* never saw each other, but each when he gave his order probably knew that A would execute it by buying one lot of tea for a number of customers. On the purchase A received a warrant, which he pledged with a bank for an advance of the purchase price. Tea falling in value, the lot purchased was resold for less than the advance. B paid to the Bank two sixteenths of the unpaid advance. A, C *et al.* having died or become bankrupts, the Bank brought an action for the balance of the unpaid advance against B, on the theory that A, B, C *et al.*, were partners. Verdict for B. Lord Mansfield: "Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss."

Young v. *Axtell*, mss. note of Mr. Serjt. Le Blanc, cited in 2 H. Bl., p. 242, 1785. "An action to recover 600*l.* and upwards, for coals sold and delivered by the plaintiff, a coal merchant, an agreement between the defendants was given in evidence, stating, that the defendant, Mrs. Axtell, had lately carried on the coal trade, and that the other defendant did the same; that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2*s.* for every chaldron, that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved, that bills were made out for goods sold to her customers, in their joint names; and the question was, whether Mrs. Axtell was liable for the debt? Lord Mansfield says, he should have rather thought on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used. And the jury accordingly found a verdict for the plaintiff."

Cooper v. *Eyre*, 1 H. Bl. 37, 1788. (A, B, C and D entered into an agreement to purchase goods in the name of A only, and to take aliquot shares of the purchase. There was no agreement to resell the goods. A purchased the goods from E and failed to pay. E sued B, C and D for the price as partners. A verdict was directed for the defendants and a rule to show cause why a new trial should not be granted was discharged.)

Compare the following early Scottish case in which it was held that one who had separately agreed with one of the partners for a proportion of his share, was not a general partner. *Fairholm* v. *Majoribanks*, 17 Dict., 14558, 1725. See to the same effect, *Burnett* v. *Snyder*, 81 N. Y. 55, 1880.

WAUGH *v.* CARVER.

In the Court of Common Pleas, 1793.

2 Henry Blackstone's Reports, 235.

This action of *assumpsit* for goods sold and delivered, work and labour done, &c. was tried at *Guildhall,* before the Lord Chief Justice, when a verdict was found for the Plaintiff, subject to the opinion of the Court, on a case stated.

Erasmus and William Carver were in the shipping business at Gosport; Archibald Giesler was in the shipping business at Plymouth. The Carvers and Giesler entered into an agreement. Under this agreement Giesler removed his business to Cowes. The Carvers sent a certain class of business to Giesler, and also paid Giesler a certain proportion of the commissions they received; Giesler sent a certain class of business to the Carvers, and also paid the Carvers a certain proportion of the commissions he received. In the agreement it was expressly stipulated that neither of the parties should be answerable for the acts, deeds, or receipts of the others; but each separately for his own losses. The suit was against all the parties to the agreement as partners.[1]

The substance of the argument for the plaintiff was as follows:

The question in this case is, whether the articles of agreement entered into by the Defendants, constituted a partnership between them? That such was the effect of these articles, will appear by considering the general rules of law respecting partners, and the particular circumstances of the case. The law is, that wherever there is a participation of profits a partnership is created; though there is a

[1] The facts have been restated.

difference between a participation of profits and a certain annual payment. * * *[2]

It appearing therefore, from these authorities, that a participation of profits is sufficient to constitute a partnership, it remains to be seen, whether the agreement in question did not establish such a participation of the profits of the agency business, between the Defendants, as to make them liable as partners. In the first place, it is stated in the recital, that the *Carvers* and *Giesler* had agreed to allow each other certain proportions of each others commissions and profits. It is then agreed, that *Giesler* should, when required by the *Carvers,* remove from *Plymouth* to *Cowes,* and there establish a house: and in consequence of the *Carvers'* recommendation and assistance to support the house, *Giesler* is to allow them a moiety of the commission on ships putting into the port of *Cowes,* or remaining in the road to the Westward, addressed to him, and a moiety of the discount on the tradesmen's bills, employed on such ships: he also covenants to advise with the *Carvers,* and pursue such measures as may appear to them to be for the interest of the concerned. On the other hand, the *Carvers* agree to pay *Giesler* three-fifths of the agency of all vessels, which shall come from *Cowes* to *Portsmouth,* and put themselves under the direction of the *Carvers,* by the recommendation of *Giesler,* one half *per cent.* on tradesmen's bills, and certain proportions of warehouse rent and agency. Each party is likewise to produce true copies of the accounts of the ships to the other, and neither is to form any other connection in the agency business, during the period agreed upon: and they are to meet once a year at *Gosport,* to settle their mutual accounts, and pay over the balance. Now it was not possible to express in clearer terms, an agreement to participate in the profits of the business of ship agents, and to establish a joint concern between

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[2] The discussion of the case of *Grace* v. *Smith, supra,* and other cases given in the notes to that case is omitted.

the two houses. It may be objected, that there is a proviso, that neither of the parties shall be answerable for the losses of the other; but this would certainly be not binding on the creditors. *Lord Craven* v. *Widdows*, 2 *Chan. Cas.* 139, *Heath* v. *Percival*, 1 *Pre. Wms.* 682. *Rich* v. *Coe*, *Cowp.* 636. An agreement to share profit alone, cannot prevent the legal consequence of also sharing losses, for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership, but it has been always holden, that where there is a share of profits, there shall also be share of losses, for whoever takes a part of the capital, or of the profits upon it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have recourse. Thus if in the year 1791, the profits were 100*l.* and in the year 1792, there was a loss of 10*l.* of course the profits of the preceding year, would be the stock to which the creditor would resort for the payment of the debts which constituted part of the loss of the succeeding year. Indeed it is by no means necessary that to constitute a partnership, the parties should advance money by way of capital; many joint-trades are carried on, without any such advance: there is therefore no ground to object, in the present instance, that neither party brought any money into a common stock, in order to carry on their business.

On behalf of the Defendants, the arguments were as follows. The question is, whether this agreement creates such a partnership, as to make all liable to the debts of each. A partnership may be defined to be, "the relation of persons agreeing to join stock or labour, and to divide the profits." Thus *Puffendorf* described it, "*Contractus societatis est, quo duo plurcsve inter se pecuniam, res, aut operas conferunt eo fine, ut quod inde redit lucri inter singulos pro ratâ dividatur.*" *lib.* 5. *cap.* 8. Partners therefore, can only be liable on the ground of their being joint-contractors, or as partaking of a joint stock. In many

cases, in which questions of this sort have arisen, and the persons have been holden to be partners, goods had been sold, and a common fund established, to which the creditor might look for payment; and there it was highly reasonable to hold, that if many persons purchase goods on their joint account, though in the name of one only, and are to share the profits of a re-sale, they shall be considered as joint-contractors, and therefore liable as partners. So if a joint-stock or capital, or joint-labour be employed, each party is interested in the thing on which it is employed, and, in the profits resulting from it. But in the present case, there is no joint-contract for the purchasing goods, nor any joint-stock or labour, but the parties are to share in certain proportions, the profits of their separate stock, and separate labour: there was no house of trade or merchandize established, but two distinct houses, for the purpose of carrying on the business of ship agency, on two distinct accounts. The profits are not a capital, unless carried on as capital, and not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port, as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of the other. So if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers who entered into similar agreements to share the produce of their separate labour, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships, with which the parties were concerned, for such as came to the particular address of one, were to be the sole profit of that one. It was indeed clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must therefore be a strong and invariable rule of law, that can make the parties to

the agreement responsible for each other, against their express intent. But all cases of partnership which have been hitherto decided, have proceeded on one or other of the following grounds: 1. Either there has been an avowed authority given to one party to contract for the rest. 2. Or there has been a joint-capital or stock. 3. Or, in cases of dormant partners, there has been an appearance of fraud in holding out false colours to the world. Now the present case, is not within either of those principles: because there was no authority given to either party to contract for the others; nor was there any joint-capital or stock; nor were the public deceived by any false credit; no fraud is stated or attempted to be proved, nor can the Court collect from the articles that any was intended: it was merely a purchase of *Giesler's* profits by giving him a share of those of the *Carvers,* to prevent a competition between them.

Lord Chief Justice Eyre.—This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking house, to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence.

The definition of a partnership cited from *Puffendorf* is good as between the parties themselves, but not with respect to the world at large. If the question were between *A.* and *B.* whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labour, and on what agreement they were to divide the profits of that contribution. But in all these cases, a very different question arises, in which that definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting the creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable

in regard to these funds? Now a case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that *A.* is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less, with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the *Carvers* and *Giesler,* that they were not, nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case therefore is reduced to the single point, whether the *Carvers* did not entitle themselves, and did not mean to take a moiety of the profits of *Giesler's* house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done, is clear upon the face of the agreement: and upon the authority of *Grace* v. *Smith,* he takes a moiety of all the profits indefinitely, shall, by operation of law, be made

liable to losses, if losses arise, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace* v. *Smith,* and I think it stands upon the fair ground of reason. I cannot agree, that this was a mere agency, in the sense contended for on the part of the Defendants, for there was a risk of profit and loss; a ship agent employs tradesmen to furnish necessaries for the ship, he contracts with them, and is liable to them; he also makes out their bills in such a way as to determine the charge of commission to the ship owners. With respect to the commission indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risk of profit and loss, to the person with whom he contracts, in the transactions with him, as with any other trader. It is true, he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him, as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though with respect to each other, these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the Plaintiff.

Gould, J. I am of the same opinion.

Heath, J. I am of the same opinion.

Rooke, J. having argued the case at the bar, declined giving any opinion.

Judgment for the Plaintiff.[3]

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[3] *Reid* v. *Hollingshead,* 4 B. & C. 867, 1825. (A, a merchant, directed B, a broker, to purchase cotton, allowing B one-third interest therein in lieu of commission. In the correspondence between A and B the matter was referred to as "joint account," "joint concern," etc. *Held,* that A and B were partners.)

Barklie v. *Scott,* 1 H. & B. 83, 1827. (C and D were in partnership. A invested money in the firm for A's infant son, B. C and D wrote to A acknowledging the receipt of the money as "B's capital put into this house," and agreed to account to A as trustee of B for one-third of the profits, and to be governed and directed by A's advice in all matters pertaining to the business. A had no personal interest in the business, nor did he reserve any power as trustee for B of drawing out the principal or profits. *Held,* that A was not a partner.)

Cox v. *Delano,* 3 Dev. 85, N. C. 1831. ("Memorandum of an agreement by and between Benjamin Delano, and Samuel Whelden. The said Delano agrees to let a schooner to him belonging, * * * to the said Whelden, upon the condition as follows: Said Whelden to pay all charges which may arise on said schooner, as long as he shall have possession of her, except * * * one-half expenses of port charges, one-half the expense of lights used on board, and the wages of one seaman. The said Whelden is to return the schooner at the expiration of six months, in like good order as delivered. The said Whelden is empowered to invest the proceeds of freight in such merchandise as he may think of mutual interest. All profit over and above the expenses above mentioned, to be equally divided." *Held,* that the agreement constituted the parties to it partners. Henderson, C. J.: "He who shares in the profits, which are nothing but the net earnings, should also share in the losses, if there be any. The moral right of making gains is based upon this principle. The rule is easily laid down; the difficulty is in its application. Where a part of the profits themselves *is the property* of the party, he is then a partner. Where their amount merely ascertains the amount of a debt or duty, but they themselves do not *belong* to the party, there is not a partnership.")

Goddard v. *Hodges,* 1 Cr. & M. 33, 1832. (The shareholders in a certain company were partners. A was the solicitor of the company. B at the request of A became the holder of certain shares for the benefit of A, A paying all expenses on the shares. A brought a suit in assumpsit for money paid out by him in travelling for the company. *Held,* that he, A, was a partner; and, therefore, could not sue the other partners at law until a balance was ascertained.)

Leggett v. *Hyde,* 58 N. Y. 272, 1874. (A advanced to B and C for use in their business $2,000. A was to receive one-third of the profits to be settled half yearly, and at the end of the year if he did not wish to go into partnership the $2,000 was to be repaid. A never received any profits or exercised any control. D sued A as a partner with B and C for goods sold to the firm. The Court directed a verdict in favor of D. Judgment affirmed. Folger, J.: "It was one-third of the profits that he was to have, and not a sum in general, equal to that one-third. So that he was to take it as profits, and not as an amount due; not as a measure of compensation, but as a result of capital and industry," p. 277.) As to how far this case represents the present law in New York, see opinion in *Beecher* v. *Burk* and case of *Hackett* v. *Stanly, infra.*

WILKINSON *v.* FRASIER.

At Nisi Prius, in the Court of Common Pleas, 1803.

4 *'Espinasse's Reports,* 182.

Assumpsit against the Defendant, who was the Captain of a ship employed in the Southern Whale-Fishery, to recover seamens' wages.

The action was brought, and the Plaintiff declared on the usual articles for voyages on that fishery; by which the seamen are, by their articles, to receive a certain share of the produce of the cargo in lieu of wages.

The Plaintiff proved the articles; which were signed by the Plaintiff, as a mariner; and by the Defendant, as captain; the sailing of the vessel on the voyage, and the Plaintiff's service; and that the oil, of which the cargo was composed, had been sold, and produced a certain sum; for the share of which the Plaintiff went.

These articles stipulated, on the part of the sailors, That they should proceed on the voyage, do their duty, &c.; and on the part of the captain, That the produce of the voyage should be divided in certain proportions: *viz.* A certain proportion to the owners, a certain proportion to the captain, and the rest to the other officers and seamen. The proportion of a common sailor was, a one-hundred and ninetieth part.

Best, Serjt. objected: That the action could not be maintained against the Captain, who was the present Defendant; because the Defendant, as well as the Plaintiff, was to be paid out of the profits of the voyage: that they were therefore partners; and as one partner could not maintain this action against another, the action was not maintainable.

Lord Alvanley said, He would not nonsuit the Plaintiff on such an objection: That the Plaintiff, and the other

sailors, were hired by the Defendant and the owners, to serve on board the ship for wages to be paid to him; and the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place: and that he should not therefore consider them as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage.

There was a verdict for the Defendant.[1]

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[1] *Compare: Hesketh* v. *Robertson,* 4 East. 144, 1803. (A authorized B to purchase goods for him, A, B for his trouble to have half the profits. B paid for the goods, and sued A in assumpsit for the money. *Held,* he could recover.)

French v. *Styring,* 2 C. B., n. s., 357, 1857. (A and B being joint tenants of a race horse, it was agreed between them that A should keep and train and have the general management of the horse, conveying him to and entering him for the different races; that the expenses of keep should be borne jointly, and the horse's winnings be equally divided between them. *Held,* that even if this agreement constituted a partnership in the management of the horse, a question on which the Court was divided in opinion, nevertheless A could sue B for a moiety of advances made by A on account of the keep of the horse as being in the nature of an advance of capital for B.)

DUNHAM *v.* ROGERS.

In the Supreme Court of Pennsylvania, 1845.

1 *Pennsylvania Reports*, 255.

This was an appeal by Dunham from the judgment of a justice of the peace, before whom Rogers brought suit against Dunham for the value of certain lumber, sold and appropriated to the use of the defendant.[1]

Gibson, C. J.:

It is not alleged that this lumber was sold immediately to Dunham, and as it was furnished to Bronson and used by him, if Dunham is not liable for the price of it as Bronson's partner, he is not liable for it at all. Do the terms of their agreement make him liable for Bronson's purchases to third persons? Bronson let his storehouse, with the unenclosed ground, to Dunham, for the purposes of a store and lumber yard; and agreed to furnish him wooden handles for shovels and other implements, made to order, out of Bronson's stuff, and to be paid for, according to a tariff of prices, out of the store or the proceeds of the handles; while Dunham agreed to stock the store and conduct the business of it. So far the agreement discloses no feature of partnership; but in further compensation of Bronson's labour, skill, and the rent of the storehouse, Dunham agreed to allow him a commission of fifty per cent. on the net profits of the whole. Now, it has been so often and so invariably ruled in England and America, that a commission on profits is not such an interest in the concern as constitutes partnership, that the point is at rest. What staggers the mind, in this instance, is the apparent shallowness of the distinction, when it is considered that a commission of fifty per cent. is no more nor less than an equal

[1] The statement of the case in the report, and the arguments of counsel are omitted.

division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle; and that, whatever be the proportion, the relation produced by a compensation in the form of a commission is in every instance the same.

But, by the terms of the contract, Bronson, and not Dunham, was to procure and pay for the stuff; and they were not to be partners in that part of the business. This provision, I admit, would be inoperative against strangers, if the parties had held themselves out to the public as partners, both in buying and selling; but assuming, for the moment, that there was indeed a partnership in the handles when furnished, and in the store when stocked with goods, yet it is to be borne in mind that the handles, as well as the store-goods, were to be put into the concern as separate contributions to the joint-stock; and that, as the stuff for the handles was to be procured by Bronson, it was, consequently to be paid for by him, just as the store-goods were to be procured and paid for by Dunham, having been purchased on separate account. There may be a partnership for selling, and not for buying; or, for buying, and not for selling; or, for both buying and selling, which is the most usual: as, if several put separate quantities of wheat into a common stock, to be ground into flour and sold on joint account; or agree to buy jointly, and divide the article when bought; or agree to buy and sell on joint account. In the first case, each would be liable for his own purchases only; but in the second and third cases, each would be liable for the whole. Now, if there were any partnership in this instance, it would be of the first class; and in any view of the case, the defendant would not be liable.

Judgment reversed, and venire de novo awarded.[2]

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[2] *Compare: Heap* v. *Dobson*, 15 C. B., n. s., 460, 1863. (A, B and C agreed that each should furnish £3,000 worth of goods, to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments. *Held*, that B and C were not responsible for goods bought by A to furnish his quota of the cargo.)

HOLMES *v.* OLD COLONY RAILROAD CO.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1855.

5 *Gray's Massachusetts Reports*, 58.

ACTION OF CONTRACT against James S. Parker, Henry C. Tribou and the Old Colony Railroad Corporation, described as copartners and keepers of the Samoset House in Plymouth, under the style of Parker & Tribou, to recover for supplies furnished by the plaintiffs to that hotel. Parker and Tribou pleaded certificates of discharge in insolvency, and the plaintiffs discontinued against them; and the plaintiffs and said corporation submitted the case to the decision of the court.[1]

DEWEY, J. It is contended on the part of the plaintiffs, that the stipulations existing between the Old Colony Railroad Corporation and Parker and Tribou, the lessees of the hotel called the Samoset House, in relation to the leasing of said house, were such as to render the Old Colony Railroad Corporation a partner in the concern, and liable, as such, to creditors who may have furnished provisions and other articles for the hotel, at the request of Parker and Tribou.

Such copartnership is supposed to arise from the agreement between these parties, providing that the Old Colony Railroad Corporation shall receive for the use of the premises leased, in addition to the sum of five hundred dollars for the use of the furniture, "one-half of the net proceeds arising from keeping the house as a hotel."

Whatever doubts may formerly have existed as to the effect of an arrangement like that made in the present case, entitling the lessee to receive, as a compensation for the

[1] The Reporter's statement of the facts of the case is omitted.

use of his property or capital stock, one moiety of the net proceeds arising from the business transacted, that question seems now fully settled at least in this commonwealth.

It is no longer true that receiving one-half of the profits, or one-half the net profits, arising from articles manufactured and sold, or resulting from business in which one furnishes the stock in trade and another performs the labor, necessarily creates a partnership. It is always competent to look at the particular circumstances of the case, and ascertain thereby whether it may not be merely a compensation to a party for his labors and services, or for furnishing the raw materials, or a mill privilege, or a factory, from which the other is to earn profits. Story on Part. Sec. 36.

This question was very fully considered in the case of *Denny* v. *Cabot,* 6 Met. 82, where it is said by Judge Wilde, in delivering the opinion of the court, "where a party is to receive a compensation for his labor, in proportion to the profits of the business, without having any specific lien upon such profits, to the exclusion of other creditors, there seems to be no reason for holding him liable as a partner, even to third persons." 6 Met. 92.

That case was followed by *Bradley* v. *White,* 10 Met. 303, where the question arose upon an agreement that A should furnish the goods for a store, and pay all expenses, and B should transact the business of the store, and receive half the profits for so doing; and it was held, that this did not constitute B a partner, and that he was not liable to a creditor who had furnished goods for such store.

It may be further remarked, that in relation to contracts for the chartering of vessels, where it was stipulated that the owner of the vessel should receive a certain percentage on the profits of the voyage, it was early held that such an interest in the profits did not constitute a partnership. *Reynolds* v. *Toppan,* 15 Mass. 373. *Cutler* v. *Winsor,* 6 Pick. 335.

In looking at the particular contract existing between these parties, it is quite obvious that no partnership was contemplated by them. It was a part of the stipulation, clearly expressed, that the labor and expenditures in carrying on the hotel were matters solely in the hands of Parker and Tribou, and all bills were to be paid by them. The articles bought by them were their own property, as were all moneys received from the guests of the house, and the Old Colony Railroad Corporation had no right or authority over either. It seems to us to have been, on the part of the Old Colony Railroad Corporation, a mere leasing of the house and furniture, but making the rent of the former to depend wholly upon the success of the establishment. If no profits were realized, they would receive no rent; but, beyond this, they were not to be affected by the losses that might occur in the keeping of the hotel.

The agreement on the part of Parker and Tribou to keep exact accounts of all receipts and expenditures, which should be open to the inspection of the corporation, was a proper arrangement to carry out the fulfilment of the stipulation to pay one-half of the net proceeds arising from keeping the house, for rent of the same, and does not necessarily import any partnership in the proceeds thus received by Parker and Tribou.

Applying to the present case the legal principles so fully settled in the cases above referred to, the court are of opinion that this action cannot be maintained against the Old Colony Railroad Corporation.

Judgment for the defendants.

COX *v.* HICKMAN.

In the House of Lords, 1860.

8 *House of Lords Cases*, 268.

This was an action on three bills of exchange, given by one of the managers of the *Stanton* Iron Company, for goods supplied to that company. The declaration contained a count in the usual form as against acceptors on each bill, alleging it to have been "directed to the Defendants by and under the name of the *Stanton* Iron Company;" also counts for goods sold and delivered, and the money counts. The Defendants severed in pleading, each denying the acceptance of the bills; and, as to the other counts, pleading never indebted.

For some time previously to the year 1849, *Benjamin Smith* and *Josiah Timmis Smith* carried on business at the *Stanton* Iron Works, in *Derbyshire*, as iron masters and corn merchants, under the name of *B. Smith* and *Son*. In that year they became embarrassed in their circumstances, and a meeting of their creditors took place. Among these were *Cox* and *Wheatcroft*. On the 13th *November* 1849, a deed of arrangement was executed by more than six-sevenths in number and value of the creditors. The parties to this deed were the *Smiths*, of the first part; *Francis Sandars*, *John Thompson*, *James Haywood*, *David Wheatcroft*, and *Samuel Walker Cox*, all of whom were creditors, of the second part; and the general creditors (including those previously named as trustees), whose names were also set forth in a schedule, of the third part. The deed recited a lease from 1846 for twenty-one years to the *Smiths*, that they were unable to pay their debts, and that it had been agreed that there should be an assignment by them to the parties of the second part, as trustees on behalf of the creditors, to have and hold the

premises for the term of the lease, the machinery, &c., and all the estate, &c., subject to the powers and provisions thereinafter contained. The trusts were then enumerated, and, in substance, they were to carry on the business under the name or style of "The *Stanton* Iron Company," with power to do whatsoever was necessary for that purpose, and to pay the net income, after answering all expenses; which net income was always to be deemed the property of the two *Smiths,* among the creditors of the *Smiths.* And provision was made for the meetings of the creditors; and, at any such meeting, a majority in value of the creditors present was to have the power to make rules as to the mode of conducting the business, or to order the discontinuance of it. And when all the debts had been paid, the trustees were to hold the trust estates, &c., in trust for the two *Smiths.* The deed contained a covenant by the parties executing it, not to sue the *Smiths* for existing debts. *Cox* never acted as trustee; and *Wheatcroft* resigned six weeks after the execution of the deed, and before the goods for which the bills were given had been supplied; no new trustee was appointed in the room of either. The business of the company was carried on by the three other persons named as "parties of the second part." In the course of it goods were supplied by *Hickman,* who, in *March, April,* and *June* 1855, drew three bills of exchange in respect thereof. The first of these bills, which was the same in form as those afterwards accepted, was in these words:

"*Grafton* Iron Ore Works, *Blisworth,*
£. 300. 10 March 1855.

"Four months after date pay to my order, in *London,* three hundred pounds, value received. *John Hickman.*"

"To the *Stanton* Iron Company, near *Derby.*"

The acceptance was in the following form: "At Messrs. *Smith, Payne* & Co., *London.* Per proc. The *Stanton* Iron Company.—*James Haywood.*"

The cause was tried in 1856 before the late Lord Chief

Justice *Jervis,* when a verdict was found for the Defendants; but on motion on leave reserved, the verdict was entered for the Plaintiff [18 Com. Ben. Rep. 617]. The case was taken to the Exchequer Chamber, when three judges, Justices *Colcridge, Erle,* and *Crompton,* were for affirming the judgment of the Common Pleas, and three other judges, Barons *Martin, Bramwell,* and *Watson,* were for reversing it [3 Com. Ben. Rep., N. S., 523. The case was also before the *Master of the Rolls (nom. Re Stanton Iron Company,* 21 Beav. 164) under the Winding-up Acts, when his Honor held, that such a company as existed under the deed was not within those Acts]. The judgment therefore stood, and was afterwards brought up to this House.

The Judges were summoned, and Lord Chief Baron *Pollock* Mr. Justice *Wightman,* Mr. Justice *Williams,* Mr. Justice *Crompton,* Mr. Baron *Channell,* and Mr. Justice *Blackburn* attended.[1]

The Lord Chancellor (Lord *Campbell*) proposed the following question for the Judges:—"Are the Defendants in this case liable as acceptors of the bills of exchange declared upon?"—Agreed to.

Mr. Justice *Blackburn:*

The Defendants in this case are liable as acceptors of the bills of exchange declared upon. The question entirely depends on the effect of the deed of arrangement. If the effect of that deed is such that creditors executing it thereby give authority to those managing the *Stanton* Iron Company, to bind them to third persons in the usual course of business by accepting bills, the Defendants have given such authority. If the effect of the deed is not such that creditors executing that deed give authority to bind them as to third persons, the Defendants are not shown to have given any such authority, for they have never acted as trustees; nor does it appear that they have done any act beyond what

[1] The Reporter's notes of the argument of counsel are omitted.

was proper to carry out the arrangement contained in that deed.

The principal object of the deed of arrangement is to divide the property of the *Smiths* amongst the creditors according to the rules observed in banktruptcy; and for this purpose their property is assigned to trustees. The goodwill of the business which had been carried on by the *Smiths*, was part of their joint estate, and those who had the making of the arrangement appear to have thought it a valuable part of the joint estate. Instead of disposing of it to third persons, or suffering it to be lost, the arrangement made was, that the business should in future be carried on under a new style, that of "the *Stanton* Iron Company," by the trustees, in the manner stipulated for in the deed to which the creditors are parties. The question is, whether the stipulations are such as to render those creditors who are parties to the deed partners in the *Stanton* Iron Company, so far, at least, as regards liability to third persons.

Some of the Judges in the Court below have expressed an opinion that there is a distinction between the present question and that which would have arisen if the question had been whether the Defendants were liable for the consideration of these bills. I am, however, of opinion that no such distinction exists. I apprehend that all cases as to liability of partners to contracts are branches of the law of agency, and that the question always is, whether the contract entered into is within the scope of the authority conferred by those, who are sought to be charged, upon the person actually making the contract. But I take it that, as matter of law, those who are partners in a trading firm, do confer upon those who are permitted to manage the concern, authority to make all contracts which in the exigency of the business are necessary and proper and customary. This *primâ facie* authority may be restricted by express agreement, but unless those who deal with the firm have notice of this restriction, they are entitled to hold all who are partners bound by the *primâ facie* authority con-

ferred on the manager, and that equally whether the persons sought to be charged were persons to whom the creditors gave credit, or dormant partners, of whose existence they were unaware. I think the justice of this rule, as applicable to dormant partners, very questionable, but I do not think it open to question that it is the rule of law. I think that where, as in the present case, the accepting of bills is a necessary and customary part of the business, the authority to accept them is conferred as much as the authority to contract the debts for which they are given. It is true the authority is limited to accepting bills in the name of the firm, and binds only those included in that firm, but all who are partners are included in the firm.

I think, therefore, as already said, that the question is, whether the stipulations in the deed are such as to constitute a partnership *quoad* third persons, and to determine that question we must look to the terms of the deed. The material stipulations, as it seems to me, are the following: the trustees are, as soon as possible, to convert into money such parts of joint property of the two *Smiths* as shall not be necessary to carry on the said business (that excepted property not to exceed 4,000*l.*); they are to carry on the business under the name of the *Stanton* Iron Company, for which purpose they are clothed with all the powers proper to be confided to the managers of such a concern. It is agreed that after paying all the expenses and losses to be incurred or sustained in carrying out the business, they shall pay and divide the net income of the said business, remaining after answering the purposes aforesaid, into and among the creditors of the *Smiths*, in ratable proportions according to the amount of their respective debts, subject to the provisions thereinafter contained. The deed then provides that the trustees at any time may, and on the requisition of joint creditors whose debts together amount to 3000*l.*, must call a meeting of the creditors, and that the decision of the majority of such meeting shall have full power for the general benefit of the creditors to

give any directions for the discontinuance of the business, or "for the present or future management thereof", which shall be binding on all the creditors whether concurring or not. The *Smiths* have no vote in determining how the business is to be managed, and the trustees are absolutely bound to obey the directions of the meeting of creditors. If the concern is wound up, the clear residue of the monies, after paying all expenses, shall be divided among the creditors of the *Smiths* ratably as joint property. It is provided that where the debts of the several creditors are paid in full the trustees shall make over the property for the benefit of the *Smiths*, and this clause is to be noticed as being the only clause in which the trusts are for the benefit of the *Smiths*, except so far as they are benefited by the liquidation of their debts. And it is to be noticed that, from its nature, it can only come into operation when the trade of the *Stanton* Iron Company ceases. It is provided amongst other things that every creditor shall have a right at all times to inspect the books of the firm. No such power of inspection is given to the *Smiths*. Then follows a provision for the trustees, "by and with the consent of the majority of creditors in value, attending any meeting of creditors," to appoint fresh trustees in the room of those retiring. The *Smiths* have no voice in this. Then follows an agreement that all creditors executing or becoming otherwise bound by the deed should accept its provisions in full satisfaction of their claims upon the *Smiths*, and that in case any of them sue for their debts that this deed may be pleaded as a release.

These, I think, are the whole of the material parts of the deed. There is no stipulation in the deed, as to who is to provide for payment of the partnership liabilities in case the losses should be so great, as to exceed the sum of 4,000*l.*, which the trustees were authorized to retain for the purpose of carrying on the business. The parties seem not to have anticipated, or at all events not to have provided for such a contingency, which, though a probable one, is

often overlooked by those entering on a trade, but the rule of law is clear enough, that those who are partners in the concern must bear such liabilities; so that I once more repeat, the question comes round to whether the stipulations are such as to constitute a partnership amongst the creditors.

Now, on looking at the provisions of the deed, it seems to me that they are, in substance, such as would be proper if the creditors constituted themselves a joint stock company, such as it would have been at common law, and made the trustees their managing directors, but agreed that the partnership should cease as soon as a certain sum, in this case the amount of their debts, was realized. I find that the business is to be carried on by the trustees under the control of the creditors, who may give what directions they think fit as to the management of the business; that the creditors are to have a voice in nominating fresh trustees in case they are changed; and that the creditors are to have a right to inspect the books. And moreover, I find that the creditors alone are to have these powers, no similar powers being given to the *Smiths*. Then I find also that the trustees are bound to pay over the net income, after paying all expenses of the concern, ratably among the creditors. It was suggested at your Lordships' bar, that there was some distinction between the net income, after paying all out-goings, and the net profits, but I am unable to understand what that distinction is.

The arrangement is that the trading might terminate on the creditors being paid, which perhaps was the termination which the persons entering into the arrangement hoped for. In that case, the deed provides that the property shall be made over to the *Smiths*, but by so doing the trade of the *Stanton* Iron Company ceases. Whoever the partners in that firm might be, they are no longer to carry on the business after the property is assigned to the *Smiths*. It might terminate by the concern being stopped by the creditors whilst it was yet solvent; that event is anticipated by the deed, and in that case it is provided that the sur-

plus, after paying all losses, should be divided amongst the creditors. It might continue for an indefinite period, neither so productive as to pay the creditors in full, nor so bad as to be stopped; and whilst it was so continued, the creditors were to have the net income or profits, and the control of the management of the concern, and they were only to have these powers. Does this make them interested in the property or profits, so as to make them partners? That question depends on the effect of the deed, and it will be answered when we have determined the extent of their interest in the property of the firm. Suppose, a not impossible case, that the trustees had, as individuals, contracted a joint debt for some purpose unconnected with the *Stanton* Iron Company; could the partnership property of the *Stanton* Iron Company have been taken to pay the debt? Or, if the trustees had become reduced to one person, and he had become a bankrupt, would the assets of the *Stanton* Iron Company have passed to his assignees? Or would the creditors, who were parties to the deed of arrangement, have been entitled in either case to say that the property was in equity theirs, and that the trustees, except in so far as they were creditors, had no beneficial interest in it? That is a question that depends on the construction of the deed. I think the construction of the deed is such, that the creditors, parties to the deed, have bargained that they shall have a hold over the whole property of the firm, divided or undivided, and I think this bargain is effectual, and, if so, that the creditors do take the profits of the concern, so as to make them their property, before they are divided.

The deed does not provide what is to be done in the case which has actually happened, viz., that of the concern proving insolvent; but the law declares that those who take the profits of a trading concern as such, are liable to the losses, even if they have stipulated to the contrary, *Waugh* v. *Carver* and the notes thereto.

The phrase, taking the profits as such, is not a happy one, and there is some difficulty at times in defining what it means, but I think it at all events means this: it is not possible, according to the common law, to cause a trading concern to be carried on, on the terms that the advantages of a partnership, including the participation in profits, and the partnership lien and security over the assets of the firm, shall belong to those who have but a limited liability. I am aware of no case or authority inconsistent with the proposition thus guarded. Now, it seems to me, that the present defendants have, by the deed to which they are parties, stipulated that the business shall be carried on for their benefit, and under their control; that they shall be interested in all the property of the firm to such an extent as to have a partnership lien upon it. This shows that they are not merely persons permitting the *Smiths* or the trustees to carry on the business, and relying on it as a fund for payment, but that they take the profits as such, and having done so, they are partners as regards third persons. I agree that the question is one of agency, viz., whether the defendants authorized the managers of this firm to bind them, but I think it is an incident attached by law to a participation in the profits to the above extent, that such authority is given to those managing the concern. I think, for the reasons I have given, that this arrangement deed does amount to a stipulation for a participation in the profits as such by the creditors.

For these reasons, I am of opinion that the defendants are liable as acceptors of the bills of exchange declared upon.

Mr. Baron Channell:[2]

The provisions of the deed are carefully analyzed and sufficiently set forth in the judgment of the *Master of the Rolls,* which is with the papers before your Lordships; I refer to that judgment for the provisions of the deed. I

[2] Only a portion of his opinion is reprinted.

think that no new trade or concern was carried on. It seems to me, that it was the old concern, though carried on under the management of trustees, and under a new name; that it was to be carried on by parties in whom the *Smiths* on the one hand, and the general body of creditors on the other hand, placed confidence, that is to say, by the trustees; but that it was the business of the *Smiths;* that the creditors who had rights against the *Smiths,* which they might have enforced by legal proceedings, in effect, in consideration of the arrangement that the trade for the future should be carried on by the trustees, and not under the management of the *Smiths,* agreed to forego their ordinary rights, as creditors, against their debtors, and to receive a sum equivalent to what was the amount of their debts, when the net profits (that is, as I understand, profits made after satisfying all new debts), should enable the trustees to pay the parties of the third part such equivalent sum.

The business was, I think, the business of the *Smiths,* carried on with a view to their ultimate benefit; and the fact, that the creditors had power to put an end to the management by the trustees, and to discontinue the business, and to require the property, the capital, to be sold and divided amongst them in satisfaction or part satisfaction of monies, which, according to my understanding of the deed, and by virtue of the deed of arrangement, became a charge on the property of Messrs. *Smith,* does not vary the case so as to constitute the creditors of the third part partners in the business. The creditors of the third part had no power, I think, by virtue of the deed to take upon themselves the management of the business.

Supposing that I am wrong in considering the business carried on under the deed as the old business under a new name, and that the business is to be considered a new business, I think the creditors, parties to the deed of the third part, may be likened to parties who had made loans to the new partnership to the extent of their debts against the old concern, and that by stipulating to receive pay-

ment of their loans out of the net profits, the amount to be received not varying with the rate of the net profits so as to give them any interest beyond the amount of their loan, they did not render themselves partners. That was the view taken by his Honour the *Master of the Rolls* with reference to this deed. No doubt his judgment is to be considered as only deciding that this deed did not constitute a partnership within the meaning of the Winding-up Acts. But the whole reasoning goes to show that in the opinion of that learned Judge there was no partnership created by the deed; and I adopt that view.[3]

On August 3rd. The Lord Chancellor (Lord Campbell), and Lords Brougham, Cranworth, Wensleydale and Chelmsford voted unanimously to reverse the judgment.

Lord Cranworth:[4]

I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place there is an assignment by Messrs. *Smith* to certain trustees of the mines and all the engines and machinery used for working them, together with all the stock in trade, and in fact, all their property, upon trust, to carry on the business, and, after paying its expenses, to divide the net income ratably amongst the creditors of Messrs. *Smith*, as often as there shall be funds in hand sufficient to pay one shilling in the pound; and, after all the creditors are satisfied, then in trust for Messrs. *Smith*.

Up to this point the creditors, though they executed the deed, are merely passive, and the first question is, what would have been the consequence to them of their executing the deed if the trusts had ended there? Would they have

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[3] The opinions of Justices Crompton and Williams advising that the defendants should be held liable, and the opinion of Mr. Justice Wightman and Chief Baron Pollock that they should not be so held are omitted.

[4] A portion of his opinion and the opinion of the Lord Chancellor are omitted.

become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income, *i. e.* the net profits, should be applied in discharge of their demands? I think not; it was argued that as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i. e.,* that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though

he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

I have hitherto considered the case as it would have stood if the creditors had been merely passively assenting parties to the carrying on of the trade, on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body, that the trade should be discontinued, or, if not discontinued, then, secondly, a power of making rules and orders as to its conduct and management.

These powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole of the property. By the earlier provisions of the deed, they consented to abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether; or, if not, then to impose terms as to the mode in which the trusts to which they had agreed should be executed; I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act if he considered the terms

prescribed by the auditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade, or impose terms as to its management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable, it could not be contended that this would make the creditors partners, if they were not so already; and I can see no difference between stipulating for such a power to be reserved to a third person, and reserving it to themselves.

I have, on these grounds, come to the conclusion that the creditors did not, by executing this deed, make themselves partners in the *Stanton* Iron Company, and I must add that a contrary decision would be much to be deprecated. Deeds of arrangement like that now before us, are, I believe, of frequent occurrence; and it is impossible to imagine that creditors who execute them, have any notion that by so doing they are making themselves liable as partners. This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so; but the very fact that such deeds are so common, and that no such liability is supposed to attach to them, affords some argument in favour of the Appellant. The deed now before us was executed by above a hundred joint creditors; and a mere glance at their names is sufficient to show that there was no intention on their part of doing anything which should involve them in the obligations of a partnership. I do not rely on this; but, at least, it shows the general opinion of the mercantile world on the subject. I may remark that one of the creditors I see is the Midland Railway Company, which is a creditor for a sum only of 39*l*., and to suppose that the directors could imagine that they were making themselves partners is absurd.

The authorities cited in argument did not throw much light upon the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner,

where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents. This was certainly the case in *Waugh* v. *Carver*. There Messrs. *Carver*, who were ship agents at *Portsmouth*, agreed with *Giesler*, a ship agent at *Plymouth*, that if he would establish himself as a ship agent at *Cowes*, they would share between them the profits of their respective agencies in certain stipulated proportions. When, therefore, *Giesler*, in pursuance of the agreement, did establish himself at *Cowes*, and there carry on the business of a ship agent, he in fact, carried it on for the benefit of Messrs. *Carver* as well as of himself; and the Court held that, in these circumstances, the stipulation which they had entered into that neither party to the agreement should be answerable for the acts of the other, was a stipulation which they could not make so as thereby to affect third persons. Each firm was carrying on business on account, not only of itself but also of the other firm; this, therefore, made each firm the agent of the other.

LORD WENSLEYDALE:[5]

A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the

[5] A portion of his opinion is omitted.

profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is made liable as a partner.

Can we then collect from the trust deed that each of the subscribing creditors is a partner with the trustees and by the mere signature of the deed constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade; for if it is profitable, they may get their debts paid; but this is not that sharing of profits which constitutes the relation of principal, agent, and partner.

If a creditor were to agree with his debtor to give the latter time to pay his debt till he got money enough out of his trade to pay it, I think no one could reasonably contend that he thereby made him his agent to contract debts in the way of his trade; nor do I think that it would make any difference that he stipulated that the debtor should pay the debt out of the profits of the trade.

The deed in this case is merely an arrangement by the *Smiths* to pay their debts, partly out of the existing funds, and partly out of the expected profits of their trade; and all their effects are placed in the hands of the trustees, as middlemen between them and their creditors, to effect the object of the deed, the payment of their debts. These effects are placed in the hands of the trustees as the property of the *Smiths,* to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreement to receive this debt, so secured, partly out of the existing assets, partly out of the trade, is such a participation of profits as to con-

stitute the relation of principal and agent between the creditors and trustees.[6]

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[6] *Compare: Kilshaw* v. *Jukes,* 3 B. & Sm. 847, 1863. (A and B were indebted to C. A, B and C entered into an agreement by which they agreed to jointly purchase land; A and B to erect houses thereon; C to furnish the iron and receive from the sale of the houses the amount of A and B's original indebtedness to him and the price of the iron. A, B and C purchased the land from D and agreed with D to erect certain houses. In erecting the houses A and B contracted a debt for lumber with E. E brought suit on this debt against C as a partner of A and B. The jury found a verdict for the defendant. A rule to show cause why this verdict should not be set aside was discharged by the vote of Mellor and Blackburn, JJ.; Wightman, J., *contra.* Mellor follows *Cox* v. *Hickman;* Blackburn believed that the evidence of the contract with D was sufficient to have supported a verdict for the plaintiff, but was not sufficient to warrant the verdict for the defendant being set aside.)

Bullen v. *Sharp,* L. R., 1 C. P. 86, 1865. (B agreed with F that F should manage his, B's, business of marine insurance, B to do nothing in the business without consent of F. A advanced to B £5,000 to be used in B's business. B agreed to repay A at all events, to pay A annually £500, or a sum equal to one-fourth the net annual profits of the business. Afterwards B agreed in addition to pay A *et al.* all the profits of the business to be held in trust by A *et al.;* first to pay A £500; second, to pay B £500; third, to accumulate the surplus until it reached £8,500 as a fund to insure against losses in the business; fourth, if the sum of £8,500 remained intact for two years to pay A £5,000, the balance to be for the benefit of B's wife and children. A was sued on a debt incurred in the course of the business as a partner. *Held,* that the fact that A received all the profits on certain trusts did not make him a partner; that A was not a partner because he had a lien on the profits for a repayment of the money he advanced; that the fact that F was the person who conducted the business, and that F was practically selected by A, while a fact from which a jury could infer that the whole arrangement was a cloak to hide A's ownership of the business was also consistent with a distrust of B's steadiness and a desire on the part of a creditor to secure a careful management of the business, and that as this case had been left to the judges with power to draw necessary inferences of fact, fraud should not be inferred where another inference was possible. *Per* Blackburn, J., Channell, B., and Bramwell, B.; dissenting, Shee, J., and Pigott, B.

MOLLWO, MARCH & CO. *v.* THE COURT OF WARDS.

IN THE PRIVY COUNCIL, 1872.

Law Reports, 4 Privy Council Appeal Cases, 419.[1]

SIR MONTAGUE SMITH:

The action which gives occasion to this appeal was brought by the Plaintiffs (the Appellants), Merchants of *London,* against the late *Rajah Pertab Chunder Sing,* to recover a balance of nearly three lacs of rupees claimed to be due to them from the firm of *W. N. Watson & Co.,* of *Calcutta.*

The *Rajah* having died during the pendency of the suit, the defence was continued by the Respondent, the Court of Wards, on behalf of his minor heir.

The Plaintiff alleged that the Firm of *W. N. Watson & Co.* consisted of *William Noel Watson, Thomas Ogilvie Watson,* and the *Rajah,* and sought to make the *Rajah* liable as a Partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the Firm to the Plaintiffs during the time when it is contended that the *Rajah* was in partnership with the two *Watsons.*

The questions in the appeal depend, in the main, on the construction and effect of a written Agreement entered into between the *Watsons* and the *Rajah;* but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two *Watsons* commenced business in partnership, as Merchants at *Calcutta,* in 1862, under the Firm of *W. N. Watson & Co.* Their transactions consisted principally in

[1] The Reporter's statement of the facts, and his notes of the argument of counsel are omitted.

making consignments of goods to Merchants in *England,* and receiving consignments from them.

In January, 1863, they entered into an agreement with the Plaintiffs regulating the terms on which consignments were to be made between them, and under which *W. N. Watson & Co.* were authorized, within certain limits, to draw on the Plaintiffs in *London* against consignments.

The *Watsons* had little or no capital. The *Rajah* supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting Bills, for which the *Watsons* obtained discount, and which the *Rajah* met at maturity. In the middle of 1863 the total amount of these advances was considerable, and the *Rajah* desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the *Watsons.*

Accordingly, an agreement was entered into on the 27th of August, 1863, between the *Rajah* of the one part, and "Messrs. *W. N. Watson & Co.*" of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the *Rajah* to them, the *Watsons* agreed to carry on their business subject to the control of the *Rajah* in several important particulars, which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title deeds of certain tea plantations, and they also agreed, that "as further security" all their other property, landed or otherwise, including their stock in trade, should be answerable for the debt due to him.

The 10th and 13th clauses of the Agreement were as follows:

"10th. In consideration of the said advances made, and the liability incurred as aforesaid by the *Rajah,* and in consideration of any future advances which may be made by him, the Firm agrees that he shall receive from them a

commission of 20 per cent. on all net profits made by the Firm from time to time, commencing from the 1st of May, 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished.

"13th. The Firm shall in addition to the said commission pay to the *Rajah* interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the Firm, and shall also pay to the banks all discount and interest now as hereafter payable on the said acceptance."

This Agreement is not signed by the *Rajah*, but he was undoubtedly an assenting party to it.

Subsequently to the Agreement, the *Rajah* made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865, the Firm of *W. N. Watson & Co.* fell into difficulties. An arrangement was then made under which the *Rajah*, upon the *Watsons* executing to him a formal mortgage of the tea plantations, to secure the amount of his advances, released to them, by a Deed bearing date the 3rd of March, 1865, all right to commission and interest under the Agreement of August, 1863, and all other claims against them.

In point of fact, the *Rajah* up to this time had never received possession of any of the property or moneys of the Firm, nor any of the proceeds of the business, and did not in fact receive any commission. A sum of Rs.27,000 on this account was, indeed, on the 30th of September, 1863, placed to his credit in the Books of the Firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the *Watsons*.

Some evidence was given as to the extent of the interference of the *Rajah* in the control of the business. It seems the *Rajah* knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the

case; for it was conceded that the *Rajah* availed himself only in a slight degree of the powers of control conferred upon him by the agreement; in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the *Rajah* do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the *Rajah* on the ground that he was an ostensible partner, and, therefore, liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the *Watsons* to the Plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the *Rajah*.

The liability, therefore, of the *Rajah* for the debts contracted by *W. N. Watson & Co.* must depend on his real relation to that Firm under the agreement.

It was contended, for the Appellants, that he was so liable:

First, because he became by the Agreement, at least as regards third persons, a Partner with the *Watsons;* and

Secondly, because, if not "a true partner" (the phrase used by *Mr. Lindley* in his argument), the *Watsons* were the Agents of the *Rajah* in carrying on the business; and the debt to the Plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of *India* and at their Lordships' Bar, on the basis that the law of *England* relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in *India* on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that Country to a right decision. But whilst this is so, it should be ob-

served that in applying them, the usages of trade and habits of business of the people of *India,* so far as they may be peculiar, and differ from those in *England,* ought to be borne in mind.

The Agreement, on the face of it, is an arrangement between the *Rajah,* as Creditor, and the Firm consisting of the two *Watsons,* as Debtors, by which the *Rajah* obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the *Watsons* by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the *Rajah* as a Creditor of the firm.

It was contended at the Bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (See this pointedly stated by Mr. Justice *Blackburn,* in *Bullen* v. *Sharp* [Law Rep. 1 C. P. 109].) The rule had been laid down with distinctness by Eyre, C.J., in *Waugh* v. *Carver* [2 H. Bl. 235], and the reason of the rule the Chief Justice thus states: "Upon the principle that, by taking a part of the profits, he takes from the Creditors a part of that fund which is the proper security to them for

the payment of their debts. That was the foundation of *Grace* v. *Smith* [2 W. Bl. 998], and we think it stands upon fair grounds of reason."

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord *Eldon*) "to a given quantum of the profits."

The distinction was stated to be "clearly settled" and was acted upon by Lord *Eldon* in *Ex parte Hamper* [17 Ves. 412], and in other cases. It was also affirmed and acted on in *Pott* v. *Eyton* [3 C. B. 32], where *Tindal,* C.J., in giving the judgment of the Court, adopts the rule as laid down by Lord *Eldon,* and says, "Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as Agent, or commission on sales [Ibid. 40]."

The present case appears to fall within this distinction. The *Rajah* was not entitled to a share of the profits "as such;" he had no specific property or interest in them *quâ* profits, for, subject to the powers given to the *Rajah* by way of security, the *Watsons* might have appropriated or assigned the whole profits without any breach of the agreement. The *Rajah* was entitled only to commission, or a payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions

has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox* v. *Hickman* [8 H. L. C. 268] and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh* v. *Carver* [2 H. Bl. 235], and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox* v. *Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible Partner can be held liable to a Creditor of the Firm. The reason given in *Grace* v. *Smith*, that by taking part of the profits he takes part of the fund which is the proper security of the Creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the Mortgagee a Partner.

Where a man holds himself out as a Partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which Creditors may be presumed to have acted. A man so acting may be rightly held liable as a Partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words of declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the introduction to Mr. *Lindley's* excellent Treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the *Rajah* to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the *Rajah* was constituted, in fact, the managing Partner.

The contract undoubtedly confers on the *Rajah* large powers of control. Whilst his advances remained unpaid, the *Watsons* bound themselves not to make shipments, or order consignments, or sell goods, without his consent. No money was to be drawn from the Firm without his sanction, and he was to be consulted with regard to the office business of the Firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied, without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt.

On the other hand, the *Rajah* had no initiative power: he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the *Watsons* to continue to trade, or even to remain in partnership; his powers, however large,

were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt.

Their Lordships are of opinion, that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the Agreement was that of Creditor and Debtors. The *Watsons* evidently wished to induce the *Rajah* to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the Agreement is really founded on the assumption, not of community of benefit, but of opposition of interests.

It may well be, that where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to shew that any other was contemplated: but that is not the present case, where another and different contract is shewn to have been intended, viz., one of loan and security.

Some reliance was placed on the Statute, 28 & 29 Vict. c. 86, sect. 1, which enacts, that the advance of money to a firm upon a contract that the Lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a Partner, or render him responsible as such. It was argued, that this raised an implication that the Lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the Legislature supposed it to be, the implication arising from the Statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the 5th clause of the Act, so far as regards *England*, it is not necessary for their Lordships to consider. The Indian Act, No. XV. of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the Appellants that if "a true partnership," had not been created under the Agreement, the *Watsons* were constituted by it the Agents of the *Rajah* to carry on the business, and that the debt of the Plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise and the relation of Principal and Agents must on some other ground be shewn to exist. It is clear that this relation was not expressly created, and was not intended to be created by the Agreement, and that if it exists it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the *Rajah*. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of Partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the *Watsons* and the *Rajah* so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the *Rajah*, as principal, in any other character. He was not, in any sense, the Owner of the business, and had no power to deal with it as Owner. None of the ordinary attributes of Principal belonged to him. The *Watsons* were to carry on the business; he could neither direct them to make contracts, nor to deal with particular Customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and subject to those powers, the *Watsons* remained Owners of the business and of the common property of the firm. The Agreement in terms and, as their Lordships think, in substance, is founded on the relation of Creditor and Debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what

it professes to be, viz., one of loan and security between Debtors and their Creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as Principals, and putting forward, as ostensible Traders, others who are really their Agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the *Rajah* was not liable for the debts of the Firm of *W. N. Watson & Co.*, took a correct view of the case; and they will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.[2]

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[2] *Compare: Badeley* v. *Consolidated Bank*, L. R., 38 Ch. D. 238, 1888. (The plaintiff advanced money to a contractor to enable him to carry out a contract with a railway company for the construction of a railway, and the parties executed a deed by which the contractor assigned to the plaintiff all his machinery, plant, &c., and all shares and debentures he might receive from the company to secure the repayment of the loan. The deed contained the following provisions: (1) that the plaintiff should receive 10 per cent. interest on the money advanced and 10 per cent. of the net profits of the contract; (2) that the contractor should apply all the moneys advanced in carrying on the works; (3) that if the contractor should become bankrupt the plaintiff might enter and complete the works; (4) that the plaintiff might sell the property in case of default, but that he should not sell the shares or debentures within twelve months after the completion of the contract; (5) that in calculating the net profits the contractor should be allowed to draw out £1,000 a year for his services. Letters passed between the plaintiff and the contractor in which the money advanced was spoken of as "capital" and "working capital," and expressions were used shewing that both parties had a common interest in the works. *Held*, that the stipulations in the deed and expressions in the correspondence were all consistent with the object of securing repayment of the money advanced, and were not sufficient evidence to show a partnership between the parties.)

EASTMAN *v.* CLARK.

In the Supreme Court of New Hampshire, 1872.

53 *New Hampshire*, 276.

Assumpsit, by Cyrus Eastman against Curtis C. Clark, Damon Y. Clark, and Nicholas T. Stillings, to recover a balance alleged to be due for three hundred and seventy-five bushels of corn sold by the plaintiff to the defendants in the summer of 1864. The two first defendants were defaulted, and Stillings pleaded the general issue.

At the trial, it appeared that in the summer of 1864 the defendants were engaged in running a line of stages between the Crawford house in the White Mountain Notch and the town of Jackson. It was agreed between them that the two Clarks should furnish a coach and two six-horse teams and driver and other appointments for the use of this line, and that Stillings should furnish the same amount of stock; and the parties did so furnish such stock.

There was conflict in the evidence as to the way the teams and other material were to be supported, the plaintiff's testimony tending to prove that the teams were supported at the joint expense of all the defendants, and that the profits of the entire business were divided by the parties, one-half to the Clarks and one-half to Stillings, while the defendants' testimony tended to prove that each party was to support and maintain his stock at his own expense and not at the joint expense of the three defendants, and that it was so maintained, and that the gross receipts of the business were to be divided between the parties, one-half to the Clarks, and one-half to Stillings, and that they were so divided.

The court instructed the jury that the defendants would be partners in respect to third persons, whether by the agreement the profits or the gross receipts were so divided, and

would be jointly liable for supplies furnished for the business, unless the plaintiffs had notice that there was to be no such joint liability. To these instructions the defendants excepted. The jury returned a verdict for the plaintiff, but, in answer to a question put to them, found that the profits were not divided, but that the gross receipts were divided. The plaintiff's evidence also tended to prove that Stillings expressly authorized Curtis C. Clark to purchase this corn on joint account of the three defendants, and that he did so purchase it, but the jury, in answer to a question put by the court, found that no such express authority was given by Stillings. The defendants move for a new trial for error in the instructions aforesaid, and in case there is error in those instructions, as to the effect of a division of the gross receipts, the verdict is to be set aside, and a general judgment entered for the defendant Stillings. Some time after the jury had retired, they sent to the presiding justice this question: "If the jury find that the Clarks and Stillings divide the gross receipts, does that bind them jointly to the third party?"—to which this answer was made in writing, with directions to return it into court with the other papers: "If the jury find that the Clarks and Stillings ran the staging together upon the agreement to divide the gross receipts between them, they are liable for supplies furnished for that business." The defendants' counsel except to these instructions, because of omitting the qualifications that the defendants would be liable jointly unless the plaintiff had notice that there was to be no such joint liability; which qualification had been before distinctly given. If there is error in omitting this qualification, the verdict is to be set aside,—but no judgment entered for Stillings, unless error is found in the instructions as to gross receipts.[1]

Doe, J.: When Judge Story had written his treatise on agency, he began his commentaries on the law of partnership thus: "Having completed our review of the law of agency, we

[1] The Reporter's notes of the opinion of Chief Justice Bellows, who died before the decision was reached, is omitted.

are naturally conducted, in the next place, to the consideration of the law of partnership; for every partner is an agent of the partnership, and his rights, powers, duties, and obligations are, in many respects, governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and, so far as he acts for his partners, he may as properly be deemed an agent." Story on Part., sec. 1.

"The authorities are uniform in maintaining the doctrine that, where the principal is unknown to the vendor at the time of a sale, he may, upon discovering the principal, resort to him for payment, although, in the absence of such knowledge, the credit may have been given to the agent alone, and his individual note alone have been taken for the debt. Story on Agency 291; *Paterson* v. *Gandasequi,* 15 East, 62; *Raymond* v. *Crown & Eagle Mills,* 2 Met. 324; *Thomson* v. *Davenport,* 9 B. & C. 78. The same principle, which seems to have been uniformly applied to the case of principal and agent, is equally applicable to that of an individual partner and his firm. Each partner is an authorized agent for the firm; and if the individual partner obtain money or goods on his own credit for the use of the firm, without disclosing the interest of the partnership in the transaction, the debt contracted is the debt of the firm, notwithstanding the note of the individual partner alone may have been given and taken therefor." *Tucker* v. *Peaslee,* 36 N. H. 167, 176; *Farr* v. *Wheeler,* 20 N. H. 569, 575. "As the defendants were partners, they were both liable to the plaintiffs, notwithstanding at the time of the sale the plaintiffs supposed that they were giving credit to Smith only. In purchasing the goods, he was the authorized agent of the copartnership, * * and the plaintiffs * * may well sustain an action against those who were in truth the purchasers." *Smith* v. *Smith,* 27 N. H. 244, 253.

When A authorizes B to make a contract in his behalf, the contract is, in a certain sense and for some purposes, the contract of A. In contemplation of law he makes it. Whether he makes it personally, by the exercise of his own mind, hand, or voice, or instrumentally by the mind, hand, or voice of his agent B, is immaterial so far as his own liability is concerned. He is as much the principal in one case as in the other. So he is equally a principal whether he is sole principal and B his agent, or whether B is a joint principal with him as well as his agent. If they are partners, B makes the contract as a principal, and also as agent of A. If we say he makes it as an agent of the firm, we mean that he makes it as agent of A, and also as agent of himself. And as the contract is equally A's contract, whether B is merely his agent, or his agent and also a joint principal with him, so in each case A is equally bound, whether he is or is not known to the other contracting party to be a principal. The cases in which A is not liable because the other contracting party, knowing him to be a principal, elects not to contract with him, stand upon the ground of the election thus made by the other party. Without reference to that exceptional class of cases, and with sole reference to the general question raised in this case, if B is agent, A is liable because he is the principal: if B is a joint principal as well as agent, A is liable because he is a principal: if A is known to the other contracting party to be a principal, he is liable because he is a principal: if he is not thus known, he is liable because he is a principal.

In the case supposed by Brother SMITH, where A employs B to make a purchase in B's name for him (A), upon a secret agreement between A and B that A is not to be responsible to the seller for the price, a difficulty arises from an ambiguity in the terms, "A employs B to make a purchase in B's name for him (A)." If this means that A is the principal and B his agent, A is liable because he is the principal. *Edmunds* v. *Bushell*, L. R., 1 Q. B. 97. If it means that B, as principal, is to buy the property of C, and

then sell it to A, A is not liable to C because he is not the principal. The question of A's liability is the question whether, in the contract of purchase from C, A is in fact the principal and B his agent, or whether B is the principal, who, after he has bought the property of C, is to sell it to A; whether the title passes directly from C to A, or from C to B and from B to A; whether there are to be two successive purchases of the same property, or only one; whether (in the contract of purchase from C) A or B is the purchaser. This depends (so far as A's liability is concerned, and aside from fraud and estoppel) upon the understanding between A and B. If they understand the title passes directly from C to A, and not through B as an intermediate purchaser, A is the principal, B is his agent, and A, as the purchaser, is bound to pay C for the property which he buys of C. A's denial of the fact that he is the purchaser, has no more effect than his denial of any other fact; an agreement between him and B to deny the fact, does not alter the fact; A, being the purchaser, is responsible as the purchaser for the price; he is liable upon the fact, and is not discharged from his liability by an understanding between him and his agent that the fact should not be disclosed or should be denied. A purchase of goods is a sale; and a sale is something more than the vendor's parting with his property. It includes payment made, promised, or in some way provided for by the other party to the contract. The buyer, *i. e.*, the principal who buys, is necessarily a payer, unless the vendor agrees he shall not be. If the agreement between A and B is made known to C during the negotiation, and he expressly or impliedly agrees not to look to A for payment, he is bound by his agreement; but he is not bound by a secret agreement between A the purchaser and B the purchaser's agent, that A is not to pay C for property bought by A of C. When C discovers that A is the buyer, he is not deprived of all the benefit of that fact by the undisclosed agreement *inter alios* that A is not to pay for what he buys. That agreement does not make the agent B the purchaser in fact, nor relieve

the purchaser A from his part of the contract of purchase made with C. The agent, holding himself out as the purchaser, is estopped to deny, as against the vendor C, that he is the purchaser. But the secret agreement between the real purchaser and his agent, that payment is to be made by the latter and not by the former, is no part of the contract of purchase: it is merely an extraneous executory agreement *inter alios* to which the vendor is not a party. C is a party in the contract of purchase; and if A is the purchaser, he is liable to C because he is the purchaser. The fact that he is the purchaser is the material thing; the non-disclosure of that fact, so far as his liability is concerned, is immaterial; his intention not to pay is as immaterial as it would be if he had held himself out as purchaser, and had omitted to disclose the fact that he intended not to pay.

The question whether A is a principal and B his agent, that is, whether A authorizes B to make the contract in his behalf, is often a difficult question of fact. And if B is a principal, the question whether A is a principal is the same, and may be as difficult, as it would be if B were not a principal. If B is a principal, the question whether A is a principal is called a question of partnership: if B is not a principal, the question whether A is a principal is called a question of principal and agent, or agency. The legal character of the question whether A is a principal, is not altered by the circumstance that B is or is not a principal, nor by the circumstance that it is called in one case a question of partnership, and in the other a question of agency. And as that question is not affected by the name given it by the tribunal called upon to decide it, so it does not depend upon the name given it by A or B, or both of them. Through all forms and words, all arrangements simple or complicated, all pretences true or false, all contrivances honest or fraudulent, the law requires the tribunal to search for the substance, the meaning, the understanding, and the fact; and this duty is the same whether B is a principal or whether he is not.

Not only is A liable as a principal when, as a matter

of fact, he is a principal, whether B is or is not a joint principal with him, and whether A is or is not known by the other party to be a principal,—he may also be liable when, as a matter of fact, he is not a principal. The common-law rule, generally called the doctrine of estoppel, is applicable, and is applied to the liability of A as a principal in a contract made by B. If B is held out by A, or by his direction or consent, as his agent, A is liable as a principal: he is estopped to deny the existence of the state of things which he directly or indirectly induces another, or causes another to be induced, to believe in and act upon. Though not a principal in fact, he is a principal in contemplation of law, because he is estopped to deny that he is a principal. Being estopped in law to deny that he is in fact a principal, is, so far as liability to creditors is concerned, practically the same as being a principal in fact. Causing another to act upon the belief that he is a principal, and that B is authorized to make a contract in his behalf, that is, is his agent for that purpose, he is estopped to deny the existence of the relation of principal and agent between himself and B,—in other words, is estopped to deny B's authority,—without regard to the question whether B is or is not a joint principal or copartner. The estoppel operates in the same manner and with the same result, whether B is an agent merely—*Hatch* v. *Taylor*, 10 N. H. 538; *Towle* v. *Leavitt*, 23 N. H. 360, 374—or an agent and also a joint principal. *Smith* v. *Smith*, 27 N. H. 244, 252. If A holds B out, or authorizes B to hold himself out, as his agent, the circumstance that B is or is not a principal, is immaterial in the application of the doctrine of estoppel to A.

Here are two general elementary doctrines of the ancient common law, holding A liable as a principal on a contract made by B:—1. The doctrine of the liability of an actual principal, disclosed or undisclosed; 2. The doctrine of estoppel, which under certain circumstances makes a man a principal in law when he is not a principal in fact. The latter doctrine, applied to this subject, is merely one of the

methods of ascertaining whether A is a principal. Both doctrines constitute the single doctrine of the liability of a principal. If A is in fact a principal, he is liable because he is a principal: if by the process of estoppel in law he is a principal, he is liable because he is a principal. And each of these doctrines or parts of a single doctrine has a legal operation and effect irrespective of the question whether B is or is not a joint principal or copartner with A. The application of these doctrines to the question of A's liability does not render it necessary to determine whether the question is one of agency or partnership, that is, whether B is an agent merely, or an agent and also a principal, because, whether B is or is not a principal, A is equally and for a single reason liable as a principal disclosed or undisclosed, and is equally and for a single reason estopped to deny that he is a principal. He is liable because he is a principal, or because he holds himself out or suffers himself to be held out as such. He is none the less nor for a different reason liable when, B being a principal, the question of A's liability is called a question of partnership: he is none the more nor for a different reason liable when, B not being a principal, the question of A's liability is called a question of agency: and the test of his liability is not more ambiguous nor anywise different when, it being uncertain whether B is or is not a principal, it is consequently uncertain whether the question of A's liability is to be called a question of partnership or a question of agency. If it is never settled whether B is a principal, and it is consequently never known by which of its possible names the question of A's liability is to be called, that question can be settled notwithstanding it is an anonymous one; and it must be settled on the same legal grounds as if its name were known. So far as the general legal test of A's liability is concerned, the two names of the question are synonymous. These legal rudiments every one expresses in language most satisfactory to himself. There is a choice of words. For instance, when B is a principal, and the question is whether A is liable as a copartner or joint prin-

cipal with him, some may use the word "partner," and others may prefer the word "principal:" which ever term is employed, the same thing is meant, and the same idea is accurately conveyed. But the use of some words in indefinite, ambiguous, and opposite senses has involved the authorities in some apparent uncertainty and confusion. When A and B are not partners in fact, but are liable to certain creditors as partners in law by estoppel, they are partners as to those creditors, though not partners as between themselves: but the phrase "partners as to third persons though not partners *inter sese,* as sometimes used, signifies not "partnership by estoppel," but something too vague and visionary to be understood or discussed. "Profit," "profits as profits," "profits as such," "profits not as profits but as something else," "a share of the profits," "a community of interest in the profits," "a specific interest in the profits as a principal trader," "a specific interest in the profits with the right to an account," "a specific lien upon the profits," "taking part of the fund on which creditors rely for payment," "jointly concerned," and other common expressions relating to partnership liability, have, in the absence of clear, precise, and fixed definitions, become a cause of perplexity. We need not dwell upon the many significations of "profit," or on any distinction between the uses of the word in political economy and in law. Story on Part., sec. 21, *n.* 1. For our practical purpose, a single illustration will suffice. Suppose B, going into the retail flour trade with no capital, hires A as clerk for one-ninth of the profit, buys 1,000 bbls. of flour of C at $10 a bbl., sells it all at $11 a bbl. in one month, in a store hired of D at $100 a month, and the business is then closed. A, C, and D having received nothing, and B having the $11,000, $10,000 of that sum is to be paid to C for the flour. The remaining $1,000 is the primary, gross, or sale profit. Deduct from that gross profit the $100 due D for rent, and we have $900, the profit out of which the deferred creditor A is to be paid for his services as clerk. Deduct from that deferred creditor fund one-ninth of it due A, and we have

$800, the final or net profit of B the principal. Until they are paid, A, C, and D are creditors. C and D stand on an equal footing as ordinary creditors: the fact that, in bookkeeping, the debt to D for rent may be recorded in the expense account does not affect its existence as a debt: the debt to A for services may be recorded in the same account. C and D are general, absolute creditors, relying for payment on everything until they are paid: then, ceasing to be creditors, they rely for payment on nothing. A is a deferred and contingent creditor, entitled to nothing until C and D are paid, and then entitled to nothing unless some of the gross profit is left. C and D, until they are paid, rely for payment on the whole of B's property,—upon the $1,000 gross profit, as well as the rest of the proceeds of the flour. They do not rely on what may be left after they are paid. They do not rely on the $900 (deferred creditor fund) left after they are paid, nor on the $800 (net profit) left after payment of all creditors, general and deferred.

If C is first paid, he takes part of the fund on which D relies for payment: if D is first paid, he takes part of the fund on which C relies for payment: but the one first paid does not, by the act of receiving payment, become liable to the other for taking part of the fund on which they both rely. That is not the fund of which A is to have one-ninth; and he is not liable to C and D for not taking a share of the fund on which they rely. The fund of which A is to have one-ninth is the $900 left after C and D are paid: on that fund C and D do not rely; and A is not liable to them for taking a part of the fund on which they do not rely. He is a creditor, though a deferred one; and, as creditors, C and D do not become liable to each other or to A by properly receiving payment out of the fund on which they properly rely for payment, so A does not become liable to them by receiving payment out of the fund on which he relies.

But if A, as a joint principal and copartner, and not as creditor, is entitled to one-ninth of the profit, it is net profit that is meant; and if he is entitled to a part of the net profit,

he is liable to C and D, not because he is entitled to a part of the fund on which they rely,—for they do not rely on the net profit; he is liable to them because he is a principal. If he is a principal, "the profit" of which he is to have a part means the balance of gross profit left after paying all creditors: if he is a creditor, "the profit" means the balance of gross profit left after paying all creditors but himself. Whether, in a particular case, "the profit" carries the one meaning or the other, depends on the question whether he is a principal or a creditor, which is the first, last, and only question in the case. We cannot know in what sense "the profit" is used by the parties until we discover whether A is a principal or a creditor. How can that be a method of answering a question, which is a deduction from the answer, and cannot be known until the answer is obtained? If A is a creditor, he is none the more and none the less a creditor by reason of his being entitled, as a creditor, to one-ninth of "the profit:" if he is a principal, he is none the more and none the less a principal by reason of his being entitled, as a principal, to one-ninth of "the profit." When A and B agree that A shall have one-ninth of "the profit," they may mean that he is to have it in the capacity of, and by virtue of his being a creditor: they may mean that he is to have it in the capacity of, and by virtue of his being, a principal. The question is, Which do they mean? The sharing-profit test merely repeats that question without answering it. As A may be entitled to one-ninth of a fund called "profit," either in the capacity of a creditor or in the capacity of a partner, his ambiguous right is not a test of the capacity in which he holds it. Taking part of "the profit" is no more the test of his being a partner than it is the test of his being a creditor.

In the supposed case, where A is a creditor and not a partner, there are three different profit funds, or one profit fund of three different amounts and with three different names,—1, $1,000 gross profit, out of which, as well as out of the other $10,000, proceeds of the flour, the general

creditors are to be paid; 2, $900 deferred creditor fund left after payment of the general creditors C and D; 3, $800 net profit, left after payment of the general creditors C and D, and the deferred creditor A. An agreement of A and B that A is to have one-ninth of the profit, means either that A is to be a deferred creditor entitled to one-ninth of the gross profit left after payment of the general creditors as compensation for his services, or that he is to be a joint principal and copartner with B, entitled to one-ninth of the net profit. In the former case, "the profit" means neither the gross profit nor the net profit, but the $900, of which the $800 left after payment of A is the net profit of the business in which B is sole principal: in the latter case, "the profit" means the $900 net profit of the business in which A and B are joint principals. The difference is, not in the amount which A is to receive, but in the capacity in which he is to receive it. In the one case, as a clerk hired by B, and as a creditor of B, he is to receive from B, in payment of his deferred debt, one-ninth of the amount of B's gross profits left after payment of other creditors: his right is a chose in action, not a thing actually or constructively in his possession: the title of the ninth is in B, and not in A, until he is paid;—in the other case, as a joint principal, before he receives his share, he owns, in common with B, the net profit left after payment of all partnership creditors of A and B: the title is in A and B: A owns one-ninth, and B owns eight-ninths. In the one case, the net profit is $800: A is a creditor of B, not a principal: B owes him $100 for wages which he can recover in assumpsit at common law:—in the other, the net profit is $900: A is a joint principal and not a creditor: B owes him no wages: their net profit cannot be ascertained and divided in a common-law action: for the debts contracted by B, within the scope of his authority as agent in earning that net profit, A would be liable, did not the existence of net profit show that those debts have been paid.

If A is clerk and creditor, he receives $100, not as his

share of the profit of a business in which he is a joint principal, but as compensation for his services in a business in which B is sole principal: he receives one-ninth of the profit, not as profit, but as payment of a debt. If A is a principal, he owns one-ninth of the profit as profit, and does not receive it as payment of a debt. The distinction between taking profit as profit, and taking it not as profit but as payment of a debt, is a familiar one, firmly established by the authorities, but not always explained as clearly as it might be. It is the distinction between a partner and a creditor obscurely expressed. Taking a share of the profit as profit, is taking it as his profit—as the profit of his flour business—as the profit of a principal—taking it in the capacity of a principal trader—an owner of the profit—a partner: taking a part of the profit as payment of a debt, is taking it in the capacity of a hired man or other creditor. If A is clerk and creditor, we mean by his share of the profit what is his when it is paid to him by his employer, but, until then, is his in a figurative sense only. If he is clerk and creditor, what is called his share of the profit belongs, as a matter of absolute legal title, exclusively to B until he pays it to A, and then belongs exclusively to A: it does not, at any time, belong to A and B in common, or in any manner indicated by the ordinary signification of the terms "share of a partner." But, if A is a joint principal, "his share" is "the share of a partner" in the net profit. The indiscriminate use of the word "share," signifying the amount of his wages and debt if he is a clerk and creditor of B, and signifying his ownership of a part of the profit in common with B, if he is a principal, is a cause of confusion. The distinction between the two significations of "share," is the distinction between a creditor and a partner.

"Jointly concerned in a transaction."—*Brown* v. *Cook*, 3 N. H. 64,—and other explanatory terms often used to describe the relation of copartners, may be useful for that purpose. In this case, the jury might be properly instructed that all the defendants were liable if they were "jointly con-

cerned" in the contract made by one of them with the plaintiffs. The judge need not confine himself to the word "copartners;" he may say "joint principals:" all the defendants were "joint principals" if they were "jointly concerned" in the contract as the parties to it on one side,—as the purchasers of the corn,—as the joint owners of the corn to whom the title passed from the plaintiffs. "Jointly concerned," if it means all that, means "joint principals:" if it means anything less it is not a useful definition, but something that needs defining, and is of no use until it is defined. And the same is true of " a community of interest" in profits or other property, or in any contract or business. If "joint concern" and "common interest" are used as synonymous with the relation of "joint principals," and if they are so understood, it is immaterial which form of expression is employed: but such terms used (as they often are) in a vague, undefined, and undefinable sense, cannot be accepted as a test of anything. What is wanted is, not a new legal language, but an accurate use of the old; not a novel doctrine, but a clear understanding of what is settled.

If A, by agreement with B, is to have "a share of the profit," meaning a part of the profit left after the payment of all debts, he is necessarily a principal, because he is either a principal or a creditor; and a creditor cannot be entitled, as a creditor, to a part of what is left after he is paid. Whether he is a principal or a creditor depends upon the agreement between him and B. If they agree he shall have a part of "the profit," what do they mean by "the profit"? If they mean the profit left after the payment of all creditors, they mean that A is not to be one of those creditors; and, not being a creditor, he must be a principal. But how are we to know whether they mean "the profit" in that sense, until we ascertain whether, in their meaning, A is to be one of those creditors whose payment is the prerequisite and test of "the profit" in that sense? Put this in what form we may, it is all a reasoning in a circle, or a

begging of the question, or a substitution of one of two synonymous questions for the other.

What difference whether A is to receive one-ninth as wages, or horse hire, or store rent, or interest of money loaned? How can a debt due him for one thing make him a creditor, and a debt due him for another thing make him a partner? What he is to receive as compensation for his own work or the work of his horse, for the use of his store or the use of his money, for knowledge and skill sold to B or for goods sold to B,—what he is to receive in the capacity of a creditor he is not to receive in the capacity of a partner. All this is merely saying, if he is a creditor, he is a creditor; if he is a partner, he is a partner. The question all the time is, whether he is a creditor or a partner; and to say the question is, whether he is to receive a part of the profit in the one capacity or the other, is, not to invent a test for ascertaining the answer of the question, but merely to state the question in a form that involves it in some obscurity. Is he a creditor, or a partner? That is the original question. Amend that question by inserting in it the so-called sharing-profit test, and the remodelled question is, Is he to receive a part of the profit in the capacity of a creditor, or in the capacity of a partner? The experiments of ninety-eight years have failed to show that the verbal alteration is an improvement, or that it has any other effect than to bewilder the inquirer who starts with the supposition that it means something.

In the supposed case, A is either a creditor or copartner of B. He is to receive a part of what they call "profit," in the capacity either of creditor or partner. The combined authorities establish a sharing-profit test in this sense: if A is to have something in the capacity of a creditor, he is a creditor; if he is to have it in the capacity of a partner, he is a partner. The discussions of the last ninety-eight years began with that; and they have ended where they began. The difficulty now is, not to ascertain the result, but to discover what disputed point was supposed to be involved in

the debate,—a difficulty not unfrequently found at the close of protracted controversies.

"Sharing profits," with the qualification "as a principal and not as a creditor," is useless as a legal test, because the qualification is a mere repetition of the question for the solution of which a test is sought: without that qualification it is useless because it is equivocal. In its literal and unqualified form, as shown by my Brother SMITH, it is not consistent with, and cannot be founded upon, the general rules of law. If in that form it could be and were a test, it would exist as the creation of arbitrary and absolute authority. In examining the authorities, it is an advantage to begin with the supposed test wholly severed and detached from dim and indeterminate generalities, and placed apart by itself in contrast with the primary principles upon which the law of partnership liability is based. If we find an authority urging that an undisclosed principal or secret partner should be liable, we know that is accomplished without a sharing-profit test: if we find an authority working out a liability by estoppel, we know a sharing-profit test in that matter is irrelevant. If we find authorities apparently presenting or recognizing a sharing-profit test, the first question will be, In what sense is the test announced, and what is the meaning and effect of its exceptions and qualifications? If, upon a careful scrutiny, the so-called test of sharing-profits, enveloped in and consolidated with its mass of exceptions and qualifications, when compared with the elementary doctrine of the liability of a principal disclosed or undisclosed, is found to be nothing more than a badly executed copy or paraphrase of that doctrine, or a *fac-simile* in disguise, the question in this case will be reduced to one of those contentions about words, which is not a legal controversy. * * * [2]

In the supposed case of flour trade, where A is to have one-ninth of the profit, if it is net profit that he is to have a

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[2] Judge Doe's interesting examination of the English and American authorities is necessarily omitted because of its great length.

share of, he is to have it, not as a creditor, but as an owner.; the net profit, in cash, specifically ascertained, identified and deposited by itself, is the joint property of A and B before it is divided; it is the residue of the proceeds of the sales; all those proceeds, as well as that residue, were the joint property of A and B; the flour which produced those proceeds was their property; it was bought and sold by them as joint principals; the title passed from C to A and B, and not to B only; B, in buying it, acted as agent of A as well as for himself; by the contract of purchase, made by B as a joint principal and agent of A, A is bound as a principal. If we begin with net profit, as the result and test, and cite, in support of it, the cases usually grouped under *Waugh* v. *Carver,* net profit leads us back to the relation of principal and agent (the doctrine of *Cox* v. *Hickman*) as the starting-point. If we begin with the relation of principal and agent, it leads us forward, over the same course, to net profit as the result. For legal and practical purposes, it is one route.

In *Cox* v. *Hickman* (and in other cases) there was a difference of opinion as to the construction of an assignment of property to trustees for the benefit of creditors, which provided for the continuance of the debtor's business, and the appropriation of the profits to the payment of creditors. The question, Who were the principals in the continued business? was rendered difficult by the complicated nature of the assignment. Whether the final decision of that question of construction was right or wrong, is not material in the present case. The same question would have arisen under the sharing-profits test. By the true construction of the assignment, were the profits to be received by the creditors as creditors, or as joint principals and partners in the continued business? The insertion of the word "profits" in the question does not cause the difficulty of the question to vanish.

Lord CRANWORTH said a right to participate in profits, "no doubt, is in general a sufficiently accurate test; for, a right to participate in profits affords cogent, often conclusive,

evidence that the trade in which the profits have been made was carried on in part for, or on behalf of, the person setting up such a claim." *Cox* v. *Hickman*, 9 C. B. (N. S.) 92. By a "sufficiently accurate test," he meant satisfactory evidence. His remark suggests how easily a piece of evidence could be transformed into a legal test *sub modo*, by tribunals accustomed, as English courts are, to declare their judgment on questions of fact. When Lord CRANWORTH said sharing-profits affords cogent evidence of a partnership, he expressed his opinion on a question of fact; and the evident soundness of such an opinion tends to obliterate the distinction between the law and the fact of the subject. Sharing-profits, in the absence of all other evidence, would, as a matter of fact, be cogent evidence of a partnership; but every item of cogent evidence is not a legal test: moreover, it is generally impossible to have no other evidence in a case than sharing-profits: whether it is cogent or weak, depends upon its character explained by other circumstances: in this jurisdiction, the judge does not give the jury his opinion of the strength of the evidence.

"A partnership in which the entire profit was to belong to some of them in exclusion of others, would be manifestly unjust; and, as between the parties themselves, it would not be a proper partnership. It would be what the Roman lawyers called *societas leonina*, in allusion to the fable of the lion, who, having entered into a partnership with the other animals of the forest, in hunting, appropriated to himself all the prey." 3 Kent Com. 29; Story on Part., sec. 18. This is civil law doctrine: it relates wholly to the force, effect, and validity of partnership *inter sese*, and has no reference to the rights of third persons. If it were a doctrine of the common law, it would go to show that the contract of a *societas leonina* is void *inter sese*, and not that the parties are liable to third persons. But it is not to be admitted, without deliberation, that there is any such doctrine in the common law. "It may be said," says Mr. Baron BRAMWELL, in *Bullen* v. *Sharp*, L. R. 1 C. P. 126, 127, "that

if this reasoning is right, a man might bargain to receive all the profits of a business, and not be liable. The answer is, the thing is impossible. There never was, and never will be, a *bona fide* agreement by one man to carry on a business, bear all its losses, and pay over all its profits. Should such an agreement appear, it would obviously be colourable." Suppose a New Hampshire merchant, having gained a sufficient estate in trade, and desiring to continue his business for the industrial and charitable purpose of supporting a missionary in Ceylon, gives him a bond to pay him all the future profits of his business; and suppose the profits are called "net profits" in the bond: was there ever a court that would hold the missionary liable as a partner for the goods bought by the merchant in carrying on his business? It would be evident that they both understood the missionary to be a creditor and not a partner; that, by "net profits," they meant the surplus of gross profits left after paying all other creditors of the business; and that, in the literal sense, there would be no net profits of the business. Why should the missionary be liable, especially seeing he was not to defraud the other creditors, but only to receive the balance of profits left after they were all paid?

The result of this examination of the authorities is, that the instructions given to the jury, in the present case, were erroneous. There is a provision in the reserved case, that, if there is error in the instructions as to the effect of a division of the gross receipts, judgment is to be rendered for Stillings. But the mistrial seems to have been such that the verdict ought to be set aside, and a new trial granted.

SARGENT, C. J.; FOSTER, LADD and SMITH,[3] JJ., concurring, a new trial was granted.

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[3] The opinion of Judge Smith is omitted.

POOLEY *v.* DRIVER.

IN THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE, BEFORE SIR GEORGE JESSEL, M. R., 1876.

Law Reports, 5 *Chancery Division,* 458.

The case involved several complicated questions of fact, but as these would be immaterial if the Court decided in favour of the Plaintiff on the question of law raised by the deeds, his Lordship directed that, by analogy to Rules of Court, 1875, Order xxxiv., rule 2, the question of law should be first disposed of.[1]

JESSEL, M. R.:

The real question I have to decide in this case is, whether certain contracts, which are admitted to have been entered into, made the Defendants partners in the firm of *Charles Borrett & Co.* If they did, then the Plaintiff, the holder of certain bills of exchange drawn or indorsed by that firm—whether he gave value for them or not is admittedly immaterial—is entitled to the relief which he asks: if not, the action must be dismissed.

Now, first of all, I must decide the question as to what sort of evidence I must rely upon to prove the partnership. I am not going to define a partnership. The attempt has been made by very many people, and some of the attempts are collected together in the well-known book by Mr. *Lindley*, now Mr. Justice *Lindley*. At pages 2 and 3 of the 3rd Edition he gives fifteen definitions of partnership by different learned lawyers: I think no two of them exactly agree, but there is considerable agreement amongst them; and I suppose anybody reading the fifteen may get a general notion of what partnership means. But I am not left to de-

[1] The Reporter's statement of the facts of the case and his notes of the argument of counsel are omitted.

cide this case on any notions of my own of what is a partnership. Whatever may amount to a partnership is a subject which has been settled by decision according to English law, and the incidents of the partnership simply follow from the establishment of the fact of the partnership. If the partnership is established as a fact, then the liability to creditors is a mere incident flowing from the establishment of the fact. But it is a contract of some kind undoubtedly—a contract, like all contracts, involving the mutual consent of the parties: and it is undoubtedly a contract for the purpose of carrying on a commercial business—that is, a business bringing profit, and dividing the profit in some shape or other between the partners. That certainly partnership is. Whether it is anything more or not has been a question between various authorities, but it is that certainly.

The Civil Code of *New York*, which contains the first definition quoted, gives this as a definition: "Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them." It undoubtedly is that. Whether it is that and something more is a question of consideration, some writers adding qualifications which are not to be found in that definition, and others excepting out of it even the community of profit; but it is at least that. There could not be a partnership without there was a commercial business to be carried on with a view to profit and for division of profits; and as a general rule, I take it, if it fulfils that definition, it is a partnership. I say, as a general rule, that simple definition appears, so far as it goes, to be an accurate definition.

Then whether or not the association requires that one or more of the partners shall contribute labour or skill, or what they shall contribute, is a question which may be considered as subsidiary; but I take it that the ordinary meaning of the word "partnership" is that, no doubt as a rule, each partner does contribute something, either in the shape of property or skill. But it is not a universal rule, and

therefore the definition of Chancellor *Kent,* which is given in the same page, is not quite correct. He says: "Partnership is a contract of two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce, or business . . ."

You can have, undoubtedly, according to English law, a dormant partner who puts nothing in—neither capital, nor skill, nor anything else. In fact, those who are familiar with partnerships know it is by no means uncommon to give a share to the widow or relative of some former partner who contributes nothing at all, neither name, nor skill, nor anything else. Therefore it is not quite accurate, as Chancellor *Kent* puts it, that they must contribute labour, skill, or money, or some or all of them.

Then *Pothier* has a definition in which he says it is "a contract by which two or more people put, or contract to put, in common something to make in common an honest profit, which they pledge themselves to render an account of to one another." *Pothier* has the words "an *honest* profit (*un profit honnête*)." The *New York* definition, oddly enough, says "carrying on business;" of course the business might be that of highwayman, and that could hardly have been meant by the framers of the *New York* Code, and I must assume that they meant some honest calling, which is supplied by *Pothier's* definition. It shews that even in the most accurate definitions inserted in a Code something must be supplied which is not expressed.

Then *Pothier* says they must have "something in common (*en commun quelque chose*)," but, as I said before, that is not necessary according to the English notion of partnership. The dormant partner may put in nothing whatever, as in the case of the widow or child of a deceased partner; therefore that shews again the enormous difficulty of giving a definition which shall be applicable to all cases. As I have already said, the *New York* definition, with the words I have put into it, will certainly be sufficient for this purpose, without considering whether it is accurate in every

respect; and I may again say that, although one of the definitions speaks of a community of loss, as a rule they do not.

This association which I have to consider certainly comes within about twelve out of the fifteen definitions, therefore *primâ facie* this is a partnership according to those definitions.

But that is not alone enough: there is authority which tells me how to find out whether a certain contract is a partnership or not. If we find an association of two or more persons formed for the purpose of carrying on in the first instance, or of continuing to carry on business, and we find that those persons share between them generally the profits of that business, as I understand the law of the case as laid down by the highest authority, those persons are to be treated as partners in that business unless there are surrounding circumstances to shew that they are not really partners.

That, of course, brings me again to another question, which must always be considered, and that is, whether, looking at the contract as a whole, it is intended to secure the benefit of a partnership with or without its liabilities; or whether it is not intended that the benefits of a partnership shall be secured. * * *[2]

It is hardly necessary to refer to any of the other authorities on the point, because those two authorities settle the law, and, as far as I am concerned, put an end to all discussion.

There is, however, a passage in the case of *Kilshaw* v. *Jukes* [3 B. & S. 847] which I think is worth referring to. It is in the judgment of Mr. Justice *Blackburn*, who says [Ibid. 865]: "It is true that the supposed case is one in the usual course of trade, whilst such a transaction as the present is rather out of the ordinary course of business; and that there always is a possibility that a person who is really a partner may endeavour to cloak his interest by an apparent arrangement of this sort. These were fair topics for the

[2] His discussion of the cases of *Cox* v. *Hickman* and *Mollwo, March & Co.* v. *The Court of Wards, supra,* is omitted.

consideration of the jury, and were no doubt urged upon them by the counsel for the Plaintiff." So that Mr. Justice *Blackburn* treats it as a question of evidence, from which the jury were entitled to draw their conclusion as to what was really intended; and that they having found against the partnership, he was not bound to disturb that conclusion. Then [3 B. & S. 868] the learned Judge says this, quoting Lord *Cranworth*: "'The debtor is still the person solely interested in the profits . . . He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors.' Taking this to be the law, and it was so necessary for the decision in *Cox* v. *Hickman* [8 H. L. C. 268] that I think it must be considered as the decision of the House of Lords, it certainly seems to me to follow that the arrangement which the jury have found to have really existed between *Jukes* and *Till* and *Wynn* did not make *Jukes* liable to the Plaintiff on the contract which the other two made for the purchase of the timber. It is not necessary in this case to consider how far the older cases are overruled by the decision in *Cox* v. *Hickman*, for it seems to go far enough, at least, to decide this case."

There is only one more passage which I wish to read from the authorities, and that is from the case of *Re English and Irish Church and University Assurance Society* [1 H. & M. 85, 106], a decision by Vice-Chancellor *Wood*: "If you employ *A. B.* to enter into a contract on your behalf, you become liable in respect of that contract, he being your agent; and it may well be, that, in the absence of any stipulation to the contrary, you make him your agent by taking part of the profits of the adventure; and it is on that footing that participation in profits comes to be regarded as a test of partner or no partner; but the real test is, whether the parties who carry on the business are constituted your agents in contracting liabilities in respect of it." Therefore the Vice-Chancellor entirely agrees that participation in profits is a

proper test and a sufficient test, if there is nothing to override it.

I may cite further from page 45 of the third edition of Mr. *Lindley's* book, considering that learned gentleman is now a Judge, the conclusion that he comes to as to the effect of the case of *Cox* v. *Hickman* [8 H. L. C. 268]—"that *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended."

I think, therefore, the law is so far settled that I ought to have no great difficulty in applying it to the case before me. Before going into the deeds at length, I will consider the effect of them.

In October, 1868, *Borrett* and *Hagen* agree to become partners in carrying on the business together of grease, pitch, and manure manufacturers. *Borrett* had carried it on before alone, but he and *Hagen* now made an arrangement of partnership. The arrangement in substance was this: that they should contribute certain shares of the capital, and should give their services in order to carry on the business; that the rest of the capital should be contributed by other persons who were disposed to come forward under the provisions of the Act to which I shall call attention presently—the Act which is commonly called Lord Chief Justice *Bovill's* Act—and then that the capital should be divided in certain proportions, giving everybody who put in £500, amongst those other contributors, a share in the capital in proportion, and a share in the profits indefinitely. When the partnership is wound up this capital is to be paid back preferentially. The contributors were to take their share of the profits, but if it turned out that, on taking a final account, the profits of any years which had been paid, being added together, exceeded the total profits made from the business, the contributors were to pay back the excess, not exceeding in any event the amount they had contributed, and of course

not exceeding in any event the amount they had received in profits.

That is the substance of the deeds; but besides that, there were a great many of the provisions usually inserted in partnership deeds, and every one of those provisions was extended to the contributors; that is to say, if they had been ordinary dormant partners, those provisions would have been inserted in their favour, and would have given them every right which, as far as I can understand, an ordinary dormant partner would have. I put it to the learned counsel, in the course of the argument, whether they could suggest any right which would be given to an ordinary dormant partner, not possessed by these contributors, and after consideration and discussion they were unable to do so. That is the general effect of the deeds.

That, then, is the position of the parties. The partnership was for the term of fourteen years; the loan also was for the same term. If the partnership comes to an end sooner, the loan must come to an end sooner; so that, in fact, if you were to describe the contributors as dormant partners in the concern, liable to a limited extent to loss, and with a guarantee of their capital from the active partners, you would exactly describe their position; and I do not know of any other shorter mode of describing the position of these contributors.

Well, if that is so, is not that exactly the thing which it was intended should not take place—that a man should not put forward another to carry on the business ostensibly and himself take the profits? It is the very object and meaning of the transaction, as I understand it, to give these contributors that very position which dormant partners usually occupy, with certain collateral advantages—exceptional, perhaps, but not altogether unusual; unusual, no doubt, in the sense that I have seldom seen—I was going to say so barefaced, but when you come to see the reason of it, I will say so palpable—an intention exhibited on the face of the documents to give the contributors all the benefits of

the partnership, and if possible to secure them from suffering from the liabilities. The reason of it was this: The framers of the instrument thought that *Bovill's Act* would protect them, and that comes again to a question of law, as to whether the Defendants who executed the deeds are in a better position than the Defendants who did not.

First of all, as to the Defendants who did not. I decided yesterday, and I merely repeat it, that Messrs. *Driver,* not being parties to any instrument in writing signed by them, were not parties to a "contract in writing" within *Bovill's Act,* and therefore could not have the benefit or protection afforded by that Act. But, with regard to the Defendants who did execute the deeds, of course they would be entitled to the benefit of the Act, and then the mere question I have to try is whether they have rightly construed the Act.

It was said, and said with considerable force, by Mr. *Chitty* and Mr. *Mathew,* that they never intended to be partners. What they did not intend to do was to incur the liabilities of partners. If intending to be a partner is intending to take the profits, then they did intend to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners. But if it is tried by the other test, whether they intended to be protected under *Bovill's Act* from liability to third persons, then I think they did intend to be protected from liability.

But it comes back again to the same point, namely, what is the true construction of the Act? Is what they did within the provisions of the Act, or without?

I must say the Act is not so easy to construe as some Acts are, and not so difficult as some Acts are; but it seems

to have been framed on an impression that the law of partnership was in a different state from what it actually was. I should be sorry to say that on my own authority, but I find it stated in pretty plain terms by the Privy Council in the case of *Mollwo, March & Co.* v. *Court of Wards,* and something of the same kind was stated by other Judges, but being Judges of Courts of first instance, I do not refer to them. The Privy Council said [Law Rep. 4 P. C. 437]: "Some reliance was placed on the statute 28 & 29 Vict. c. 86, s. 1, which enacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence."

Now, I am afraid that that criticism is by no means ill-founded. The first section of the Act is this: "The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

The law was decided before the Act, by a long train of decisions before the time of Lord *Eldon*, who found it established. He says in *Ex parte Hamper* [17 Ves. 403] that the lending of a sum of money on a *bonâ fide* contract to receive a rate of interest varying with the profits, did not make a man a partner; although, I suppose, I may take it to

be the equally well-established rule, though perhaps not so conclusively established, that the receiving of a share of the profits did: the two were lumped together by the statute, and therefore it was said, and rightly said, that there being, so to say, a misapprehension of the law which was supposed to be affected by the Act, you cannot look upon the Act itself as declaratory one way or the other.

That being so, what is the effect of the Act? The Act is this, that the advance of money must be "by way of loan." Now what does that mean? It is not the "advance of money," but "the advance of money by way of loan." I take it to mean this, that the person advancing must be a real lender; that the advance must not only profess to be by way of loan, but must be a real loan; and consequently you come back to the question whether the persons who enter into the contract of association are really in the position of creditor and debtor, or in the position of partners, or in the only third position which I think could be suggested, that of master and servant. But the Act does not decide that for you. You must decide that without the Act; and when you have decided that the relation is that of creditor and debtor, then all the Act does is this: it says that the creditor may take a share of the profits, but as I understand the law as laid down by the higher authorities to which I have referred, if you have once decided that the parties are in the position of creditor and debtor you do not want the Act at all, because the inference of partnership derived from the mere taking a share of profits, not being irrebuttable, is rebutted by your having come to the conclusion that they are in the position of debtor and creditor. That, in fact, was the decision in the case of *Mollwo, March & Co.* v. *Court of Wards* [Law Rep. 4 P. C. 419], and in the case of *Cox* v. *Hickman* [8 H. L. C. 268]. Therefore you have already decided that for yourself, and the Act does not seem to me, as far as regards the first section, to do you any good at all.

Then the only other point is as to the meaning of "shall not, of itself, constitute," &c. Now there is a possible

meaning to be given to the word "itself." It may mean this —though I am not sure that it does—that in construing a contract which, before the Act, by the mere circumstance of there being a share in the profits, would have raised a cogent, though not an irrebuttable, inference that the so-called lender was a partner, though he professed to be a lender, the mere fact of his taking profits shall not alone raise that inference. Well, if that is the meaning—and I think Mr. *Lindley* attributes that meaning to it—it does not assist me very much in coming to a decision, for of course in this case there are many other circumstances besides participation in profits, as I suppose there are always, or nearly always, in these cases; and in the next place, as I said before, I must decide for myself whether the parties are really in the position of creditor and debtor before I can apply the Act at all.

The words are, "advance of money by way of loan," and Mr. *Lindley's* note [3rd Ed. p. 46] is this: "Observe these very important words. Agreements are constantly framed with all sorts of clauses, which together probably expose the lender to the risks he is desirous of avoiding"—that is, to the risk of being a partner. I do not know why those words, "of itself," were put into the Act, unless it was supposed by the framer—which is another guess of my own, and one which, perhaps, I ought not to make, because it is imputing to the Legislature a further ignorance of law besides that already imputed to them in the Privy Council case—that sharing profits would otherwise have created a partnership of itself. If you take that meaning, then it is an alteration of the law; but *Cox* v. *Hickman* [8 H. L. C. 268] decided that that was not so, and never had been so, for of course *Cox* v. *Hickman* did not lay down any new law—the Lords say so in their speeches—and, consequently, it was not true that at any time sharing profits constituted a lender a partner, though it was a cogent test for trying the question, and would have been irrebuttable unless you could have found some circumstances altering the nature of the contract.

That disposes of the law of the case as far as I am concerned. I now come to the consideration of the details of the documents, which are certainly framed in a very singular way. They seem to me to have been purposely framed with a view of giving the whole benefit which partnership could give to the contributors, and, if possible, something more than they could have obtained as partners.

The original deed of partnership is dated the 10th of October, 1868; it is made between *Borrett* of the one part, and *Hagen* of the other. It states that they agreed to become partners "on the terms hereinafter mentioned;" then it states what the trade should be, namely, the business of a grease, pitch, and manure manufacturer; then the partnership is to commence on the 1st of July, 1868, and is to continue for the term of fourteen years next ensuing, and to be carried on in the name of *Borrett & Co.*

The capital of the partnership consists of £30,000, and is made up as follows: the goodwill—that is, the business already carried on—is to be taken at the value of £15,000; *Borrett* is to bring in a further sum of £1000, *Hagen* a further sum of £4000, and the remaining £10,000 is to be raised "by way of loan" under the provisions of the Act (giving its full title), "in sums of £500 each from persons willing to advance the same for the purpose of the said partnership; and the said capital shall be considered as divided into sixty equal parts of £500 each; and the said *Charles Borrett* shall be considered as the owner of seventeen of such parts, and the said *Edward Hagen* as the owner of twenty-three of such parts, making together forty equal parts or shares of £500 each held by them in the said business; and the remaining twenty equal parts or shares shall be considered as appropriated to or for the benefit of the person or persons so advancing money by way of loan as aforesaid on the proportion on which the same shall be advanced by them respectively."

So that the moment the contributors became parties to this deed, as I shall shew they were or did become after-

wards, they became entitled to shares in the capital absolutely. Then it goes on, "The capital of the said business shall be used and employed in the regular course of trade for the benefit of the partnership, and shall not be drawn out during the continuance of such partnership."

This is a very important clause, when you consider that the contributors get the benefit—as I shall shew presently they do—of every covenant in the deed of partnership. The result, therefore, is this, that they became not only entitled to the shares of the capital, but entitled to compel the ostensible partners to employ that capital in the regular course of trade, and might have obtained an injunction to prevent their diverting it to any other purpose. They had therefore, to that extent, a control over the capital, namely, a control over its employment; thus they were not at all in the ordinary position of lenders.

The lender does not become entitled to any part of the assets of his debtor in specie. He has only a contract which entitles him to claim payment from the debtor as a personal demand, but this supposed creditor becomes entitled to a portion of the capital in specie, and gets the right besides to prevent the legal owners of the property from applying it to any other than a particular purpose, whether they desire to do so or not. He acquires two rights, the right to an aliquot portion of the capital itself, and a right to control the disposal of the rest of the capital.

Then there is a covenant that the partners shall conduct the business during the partnership to the best of their ability. Let us test the case by that covenant. The lender can compel these people against their will to carry on the business—I do not mean to say he can actually make them carry on the business, because that is a covenant which a Court of Equity always declines to enforce, but he could have an action for damages against them for breach of the covenant, and at all events he gets the benefit of that contract. They must carry on the business, as I shall shew presently, for his benefit, because they have contracted to do so.

Then the 7th clause is that proper books of account and other books shall be kept in the usual way. Then there is a provision that the partners shall not sell, lend, or borrow without mutual consent; then that they shall not allow the assets to be taken in execution; and then that neither partner shall take any servants without the consent of the other. Then there is a provision as to outgoings; then a provision for one of the ostensible partners drawing out certain sums for maintenance. Then, that on the 1st of July in every year a general account shall be taken, and a general valuation made in the usual way, and put into a book. Then the 14th clause is this, which is very important:

"The net profits arising from the business of the said partnership shall be divided into sixty equal parts or shares, and the said *C. Borrett* shall be entitled to seventeen of such parts or shares, and the said *E. Hagen* to twenty-three of such parts or shares; and the remaining twenty of such parts or shares shall be divided amongst the persons advancing the sum of £10,000 so to be raised by way of loan as aforesaid in proportion to the amounts advanced by them respectively: Provided always, that if the whole of the said sum of £10,000 shall not be raised by way of loan, and until the sum shall be so raised, the net profits arising from the business of the said partnership shall be divided into as many parts or shares as there shall be sums of £500 in the capital of the said partnership, such capital being estimated in manner hereinbefore provided, and be paid on the 1st day of October in every year to them respectively, on account of their respective shares in the clear gains and profits of the said partnership."

The moment the contributors got the benefit of this they were clearly entitled to a share of the profits as profits. Nothing can be plainer than the terms of the provision, and it shews the intention of the parties.

Then the 15th clause is this:

"Within six calendar months after the expiration or sooner determination of the partnership, otherwise than by

the death of one of the partners, a final statement of accounts in writing shall be forthwith made by and between the said parties hereto, of and concerning all the goodwill, stock in trade, plant, moneys, credits and effects then due or belonging to the said partnership, and also of all debts and sums of money due and owing from and of all liabilities of the same, and a just valuation shall be made of all the particulars included in such account which shall require and are capable of valuation, and, immediately after such last mentioned account shall have been so taken and settled, the partners shall forthwith pay to the persons advancing money by way of loan for the capital of the partnership, as hereinbefore provided, the moneys advanced by them respectively, less any sums overpaid to them on account of the profits of the said partnership, and shall make due provision for the payment of all other moneys and debts then due by the partnership, and for meeting all the liabilities thereof, and shall divide all the profits arising and which shall have arisen from the business of the said partnership in the proportions specified in the 14th clause of these presents, and shall then appropriate the sum of £1000 for the benefit of the said *C. Borrett*, in satisfaction of two of his shares in the partnership assets, and the sum of £4000 for the benefit of the said *E. Hagen* in satisfaction of eight of his shares therein, such two last mentioned sums to be paid *pro ratâ* and *pari passu;* and, subject thereto, the goodwill and other assets, if any, then belonging to the partnership, shall be divided between the partners in equal shares . . ."

Then there is a provision to this effect, that if either of the partners becomes bankrupt the other shall have liberty to dissolve, and then the property shall become the property of the non-bankrupt partner upon his paying the value of the bankrupt partner's share to his assignees.

Then there is a provision for the widow or children of the partners; then a provision in the event of the death of either partner, which I do not think it necessary to read, and some other provisions as regards death, which pre-

cede the last clause, which is the usual arbitration clause. That is the partnership deed.

Now we come to the other deeds, which for this purpose I treat as deeds of even date. They are not exactly of even date, but they are nearly contemporaneous. The partnership dates from the 10th of October, 1868. The arrangement made with Messrs. *Driver* was made somewhere about the same time, and was made by a document which was never executed. It was a draft of an indenture dated the day of October, 1868. I may say, in passing, that the other deeds, those executed by *Bannatyne & Pye*, are about the same date—one being dated the 28th of October, 1868, and the other the 7th of November, 1868—and are in the same terms, and I will take them as having been executed shortly after the partnership.

Messrs. *Driver's* document recites the partnership deed; it recites some of the provisions that I have read; and then it goes on: "Whereas the said *Rolles Driver* and *Samuel Neale Driver* have agreed to advance by way of loan to the said *C. Borrett* and *E. Hagen*, under the provisions of an Act of Parliament passed in the 28th and 29th years of Her present Majesty, c. 86, entitled, *'An Act to amend the Law of Partnership,'* the sum of £2500, to enable them the said *C. Borrett* and *E. Hagen* to carry on the said trade or business for the term and under and subject to the stipulations and conditions hereinafter mentioned, expressed, and declared concerning the same." Then it is witnessed, "That in consideration of the sum of £2500," &c., the said *Borrett* and *Hagen* first of all covenant that they, *Borrett* and *Hagen*, "will within six calendar months after the 1st of July, 1882, or within six calendar months after the sooner determination of the said partnership, pay unto the said *Rolles Driver* and *Samuel Neale Driver*, their executors, administrators, or assigns, the sum of £2500."

That is a very remarkable thing for a loan. It is a loan during the continuance of the partnership. It is to be paid within six calendar months after its natural expiration,

or within six months after any other expiration of the partnership. Therefore, although they call it a "loan," and although I agree that, standing alone, the fact of the duration of the loan being the duration of the partnership might not of itself be conclusive, it all tends in the same way to shew that this was really intended as an advance of capital to the partnership business, made for the purpose of carrying it on, and not as an ordinary loan.

The next clause—and this is very important—is: "That the said *C. Borrett* and *E. Hagen,* their respective executors, and administrators, shall in all things conform to, fulfil, and observe the covenants, clauses, and agreements contained in the said recited deed of partnership of the 10th day of October, 1868, and such deed of partnership shall at all times be open to the inspection of the said *Rolles Driver* and *Samuel Neale Driver,* their executors or administrators, at the office where the said business shall be carried on." That imports the whole of the provisions of the prior deed into this deed, and makes *Borrett* and *Hagen* covenant to observe them, thus giving to the *Drivers* those rights both with respect to capital and profits which I have already adverted to.

Then the next clause provides that *Borrett* and *Hagen* will, during the continuance of the loan—that is, during the maintenance of the partnership—make out accounts, and once a year, on the 1st of October, pay Messrs. *Driver,* on account of profits, a sum equivalent to five-sixtieth parts of the profits for the year preceding the 1st of July then last past. Some argument was rested upon that, but nothing turns upon it, for this covenant never actually came into existence. If it had, I should have held that it did not vary the case in the least; that the prior clause gave them a share of proceeds as profits under the partnership, and this only makes *Borrett* and *Hagen* pay on account of the profits a sum equivalent to five-sixtieth parts, shewing that what they had to pay really was still profits. But that clause never came into force, because there was a proviso

at the end of it to this effect, that if the sum of £10,000 was not advanced—and it was not—then *Borrett* and *Hagen* or one of them, would "on the 1st day of October in every year during the continuance of the said loan pay to the said *Rolles Driver* and *Samuel Neale Driver,* their executors, administrators, or assigns, in lieu of the said five equal sixtieth parts of the said clear gains and profits as last aforesaid, such a proportion of the said clear gains and profits as last aforesaid as the said sum of £2500 bears to the whole capital for the time being employed in the same business, such capital being estimated in the manner provided by the said indenture partnership."

So that we have the interest of the loan not varying merely with the profits of the business, but varying in the proportion which the loan, which was part of the capital, bore to the whole capital, a circumstance which I think by no means immaterial in shewing that it was not a genuine loan in the sense of creating the relation of debtor and creditor, but that it was indeed an advance of part of the capital.

Then the deed goes on with a very remarkable provision, "That if either the said *Rolles Driver* or *Samuel Neale Driver* shall become bankrupt or shall compound with his creditors, or in case any difference or dispute shall at any time during the said term of fourteen years arise between the said parties hereto, or their representatives, and which differences or disputes shall be considered by arbitration, as hereinafter mentioned, to justify the determination of the arrangement hereby agreed upon, it shall be lawful for the said *C. Borrett* and *E. Hagen,* or the survivor of them, or their or his executors and administrators at any time hereafter to pay the said sum of £2500, less any sum they shall have been overpaid on account of the said business, to the said *Rolles Driver* and *Samuel Neale Driver,* their executors, administrators, or assigns, together with the share of the said profits (if any) to which the said *Rolles Driver* and *Samuel Neale Driver,* their executors, administrators, or

assigns, shall then have become entitled;" and thereupon the agreement is to be at an end.

Now that certainly is a very astonishing provision in an ordinary contract of loan. What has the bankruptcy of the creditor got to do with it? You pay the assignee, or trustee, as he is now called. It is a very remarkable thing that the bankruptcy of the creditor should put an end to the agreement, but you find it by no means remarkable if it was intended that they should really be partners. You find a similar provision in the actual partnership deed. Without attaching too much weight to this, I think it is very material.

Then there is another remarkable clause: "Within six calendar months after the expiration or sooner determination of the partnership, a final settlement of the accounts of the partnership shall be forthwith made in writing by the said *C. Borrett* and *E. Hagen,* their executors or administrators, concerning all the stock-in-trade, plant, moneys, credits, and effects then due or belonging to the said partnership estate, and also of all debts and sums of money (if any) due or owing from, and of all liabilities of the same, and a just valuation shall be made of all the particulars included in such account which shall require and are capable of valuation, and immediately after such last-mentioned account shall have been so taken and settled, the said *C. Borrett* and *E. Hagen* shall forthwith pay thereout to the said *Rolles Driver* and *Samuel Neale Driver,* their executors, administrators, or assigns, the sum of £2500." So that the covenant is in accordance with the partnership deed to pay the £2500 out of the assets and debts due to the partnership. I know there is another covenant to pay Messrs. *Driver* which is personal, but there stands a covenant to pay out of the assets.

Then there is a provision for payment to the *Drivers* of "five equal sixtieth parts or shares of all the net profits of the said business." That gives them all the surplus

profits that they have not yet received, including the proportion of the capital they are entitled to.

Then there is the proviso that they shall refund. It is very oddly worded, but it is agreed on all hands that it means this, that if, at the end of the partnership period, the amount already paid to the *Drivers* for profits shall exceed the total profits made in the business, they shall refund the excess not exceeding the £2500. I have rather given the effect than the words, because the words are somewhat ambiguous; but it is admitted that that must be the meaning, or, in other words, that the lender, having received profit for interest, if the business afterwards makes a loss, would have to pay back, subject to the limit that he is never to be called upon to pay more than he has received, and, subject also to this, that he is never to be called upon to pay more than the total amount of his so-called loan. It is certainly a wonderful provision, if it is a *bonâ fide* loan, and not a mere colourable transaction to get a share of the profits without being liable to losses. Did ever any one hear of anybody lending his money on such terms, or of the notion that, after having received the profits in lieu of interest, he is to pay back the whole of them, it may be, because subsequently the business, conducted not for him, but for other people, who are really his debtors, shall have given rise to losses? It appears to me that if you want to prove that the business was conducted for him, this is cogent evidence of it. It was not conducted entirely for the benefit of the persons who were merely debtors and who stood in that relation to the supposed creditor.

Then there is an arbitration clause, which is very usual in partnership articles, but not a very usual one in a mere loan deed.

These are the documents on which I am called upon to decide, and I must say that I have come to a clear conclusion that this is not a transaction of loan within the meaning of the Act of Parliament; that the true relation of the parties towards one another was that of dormant and active

partners, and not of mere creditors and debtors; that in this case I need not rely on one provision or on two provisions, but on the whole character of the transaction from beginning to end. It is an elaborate device, an ingenious contrivance, for giving these contributors the whole of the advantages of the partnership, without subjecting them, as they thought, to any of the liabilities. I think the device fails; and that, looking at the law as it stands, I must hold that they are partners, and liable to the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts.

The Plaintiff is, therefore, entitled to a judgment on these bills.

HART *v.* KELLEY.

IN THE SUPREME COURT OF PENNSYLVANIA, 1877.

83 Pennsylvania Reports, 287.

Assumpsit by H. H. Kelley against A. Hart, Pincus, Faucett, Sauter and Clarence A. Hart, for work and labor alleged to have been done about the defendants' property, as shown by the copy of book entries filed.

The defendant, C. A. Hart, filed an affidavit of defence in which he set forth that his only connection with Pincus and Faucett was this: that after the work to recover for which the suit was brought, was in a great part performed, he signed an agreement with Pincus and Faucett to advance them money in their business, and to receive, in lieu of interest, a share in the net profits of the firm; that he never did advance any money under this agreement, but, on the contrary, the agreement was rescinded immediately after it was made.

The Court below entered judgment for want of a sufficient affidavit of defence; whereupon C. A. Hart, one of the defendants, brought this writ of error, assigning this judgment for error.[1]

PAXSON, J.:

The rule of the law formerly prevailing, that participation in the net profits of a business made a participant liable to third parties as a partner, has been greatly modified in England and this country. Thus, in Dean *v.* Harris, and Harris *v.* Butterfield, Law Times Reports, N. S., vol. 33, p. 639, Butterfield, who was a person of small means, applied to Harris to advance him money for the purpose of developing certain mines. Harris consented to lend Butterfield 2000*l.*, upon certain terms, viz.: That B. having

[1] The facts as given by the Reporter are restated.

entered into an agreement to take a lease of the Leycett mines, that the said mines be worked under the style or firm of the Leycett Mining Co.; that said H. find capital to work the mines to an extent not exceeding 2000*l.*; that the money so advanced shall be repaid with 20 per cent. interest; the said H. to be paid 3*d.* per ton on all coal and iron stone, by way of commission. The said B. to be paid 200*l.* per annum by way of salary, but not to take date until the sum or sums advanced by said H. be repaid; said B. to promote the interest of the concern and continue in receipt of salary so long as he should conduct the business to the satisfaction of H. After payment of the above, and costs of raising and preparing and delivering to market the product of said mines, said H. shall be entitled to three-fourths of the profits, and all the net proceeds of the concern to be disposed of in the like proportion; said H. to be free from all liability except in respect of the money advanced by him. The vice-chancellor held, that there was no partnership, saying: "All that H. did was consistent with his character as capitalist, assisting B. in carrying on business. All that is said to constitute a partnership. If it could, it would be most unsafe for any man to lend a tradesman any sum of money, and to look after the best means he could get for its repayment." Mollwo, March & Co. *v.* The Court of Wards, Law Rep. 4 P. C. 419, is perhaps a stronger case than Dean *v.* Harris. To the same point is Cox *v.* Hickman, House of Lords Cases, vol. 8, p. 268. In this state the Act of 6th April 1870, Purdon 1121, pl. 15 (Pamph. L. 56), expressly provides that, "it shall be lawful for any person or persons to loan money to any individual, firm, association or corporation, doing business in this Commonwealth, upon agreement to receive a share of the profits of such business as compensation for the use of the money so loaned, in lieu of interest, and such agreement, or the reception of profits under such agreement, shall not render the person or persons liable as a co-partner in such business to other creditors of such individual, firm, association, ex-

cept as to the money loaned," &c., &c. It is by the light of the law thus modified by judicial decision and legislative enactment that we must examine and construe the agreement of December 13th 1875, which was attached to the supplemental affidavit of defence, and forms a part thereof. We assume that the court below held, that this agreement, as to the parties thereto, created a partnership *inter se.* In any other view of the case the supplemental affidavit of defence was ample to prevent judgment. The agreement was evidently drawn by a layman and was probably intended to come within the provisions of the Act of 1870. So far as the defendant below is concerned, it provides for two things, viz.: 1st. A loan or advance by him to Faucett and Pincus of such an amount of money as may be necessary to enable the latter to carry on the restaurant at No. 1220 Chestnut street for one year; and 2d. A division of the profits *after* such loan or advances are repaid. If the defendant can be held liable at all to creditors under said agreement it must be by reason of his right to a participation in the profits. It is not alleged that he held himself out to the world as a partner, and that any one was induced to give credit to Faucett and Pincus by reason of his connection with them. The advance of the money would not of itself constitute the defendant a partner. The participation in the profits might make him one, but not necessarily so. It would depend upon the intention of the parties as expressed by the terms of their agreement. There were to be no profits divided until the advances were repaid.

If, as was alleged upon the argument, no profits were ever made, and of course none divided, and the advances were not even repaid, the time never arrived when the defendant became a partner by reason of his participation in the profits. This was precisely the case in Dean *v.* Harris, *supra,* in which the vice-chancellor held that a participation in the profits might have made Harris liable as a partner, but inasmuch as the business was unprofitable and

no profits were ever made, he could not be held for such reason. Here the defendant pointedly denies any participation in the profits. Such denial ought to have carried the case to a jury. Again, he swears distinctly, that he never acted under said agreement, being unable to comply and advance the money, and that as to him said agreement was rescinded *immediately* after its execution. If this be so, and we are bound to assume it, he would not be liable in any view we may take of the agreement, for any debt incurred after his withdrawal, at least not to a creditor who never had knowledge of said agreement, and never trusted Faucett and Pincus on that account. Aside from all this, however, this suit is for a claim against Faucett and Pincus, upon a contract made with them prior to the agreement of December 13th. For the purposes of this case we must treat said agreement as of the date of January 7th, the defendant having sworn that the date of December 13th was erroneous. A large proportion of the work was done prior to January 7th. Assuming the defendant to have become a partner, he did not assume the debts of Faucett and Pincus. There is not a word in the agreement which binds him to pay any of their old debts. A partner who enters a firm already established, does not thereby become liable for the debts of the old firm. Nothing but an express agreement will render him so liable. If it be said that as to so much of the work as was done after January 7th, it enured to the benefit of the defendant, the answer is that the fact is not so. He acquired no title to the leasehold and fixtures by reason of the agreement. They were, and continued to be the property of Faucett and Pincus. The clause in the agreement that "the cost of fitting up the said premises, as well as all outlay for furnishing, &c., shall be considered as expenses to be first deducted before dividing any profits," does not render the defendant liable for a debt which he never contracted. In the most favorable light for the plaintiff, it is but an assumption of his claim so far as there may be profits out of which to pay it.

He merely agrees that it may be paid out of profits before his own claim for advances. This imposes no personal responsibility upon him.

We think this case ought to have gone to a jury. We therefore reverse the judgment and award a *procedendo*.[2]

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[2] *Compare: Poundstone* v. *Hamburger*, 139 Pa. 319, 1891. (B, a distiller, was indebted to A. It was agreed that A should loan B a further sum and that B should sell all the product of the distillery to A at certain prices, and pay A one-half the profits until the loan and the original indebtedness was repaid. B then sold his distillery to A, part of the consideration being the cancellation of the indebtedness of B to A. *Held*, that under the Act of April 6th, 1870, recited in the principal case, A was liable to the creditors of the business to the amount of B's indebtedness to him, which the Court held he had drawn out of the business by the arrangement in regard to the purchase of the distillery; and the Court, per Sterrett, J., expressed the opinion that under the agreement existing prior to the sale A and B were partners.)

ASH *v.* GUIE.

IN THE SUPREME COURT OF PENNSYLVANIA, 1881.

97 Pennsylvania Reports, 493.

Assumpsit, by William H. Guie to the use of J. Alfred McCaughey, against Phineas A. Ash, Horace A. Beale, James Mullen, executor of James C. Roberts, deceased, and over one hundred others, "lately trading as Williamson Lodge, No. 309, A. Y. M."

The plaintiff's demand was founded on a claim for money loaned to the defendants, which was received by them, and used by them in the business in which they were then engaged, for which the defendants issued to the plaintiff a certificate of indebtedness.

The evidence showed the following facts: The Williamson Lodge of Ancient York Masons, No. 309, was an unincorporated association for charitable, benevolent and social purposes, the officers of which were a Worshipful Master, Senior Warden, Junior Warden, Treasurer, Secretary and a Board of three Trustees. The trustees had charge of the property of the lodge, took the title to land, collected the income and extra funds of the lodge, &c. The lodge had a seal, which was used for authenticating certificates of membership, communications by the secretary with other lodges, and for similar purposes. About the year 1867 the lodge desired to erect a building for lodge purposes. The master, at a meeting of the lodge on September 13th 1867 (without any prior resolution authorizing him so to do, so far as appeared in evidence), appointed a committee of five, consisting of the three trustees and two other members, to select a lot, procure plans for a new building, &c. The temple or building was erected under the direction of this committee of five. They appointed their own treasurer, collected funds and issued certificates

therefor, of which that in suit is one, signed by the worshipful master, the senior and junior wardens, attested by the secretary and authenticated by the seal of the lodge. The committee was not specially authorized to give said certificates, but it was the custom of the lodge to issue like instruments whenever it borrowed moneys. Prior to the use of the seal on these certificates, it had never been attached to any pecuniary obligation. The committee reported to the lodge from time to time, and its action was approved by the lodge.

The defendants presented several points among which was the following:

The defendants' association was not such a partnership as is chargeable for the acts of any members of the association, and no person who was not present at the time that any of the actions bearing upon this matter were presented to the lodge can be held responsible in this suit.[1]

The court charged the jury as follows: "The questions involved in this case are questions of law. The points will be reserved by the court for future consideration. We direct you to render a verdict for the plaintiff for the amount of his claim, and the questions raised during the trial will be more fully considered hereafter."

Verdict accordingly for the plaintiff for $160. The court subsequently entered judgment for the plaintiff on the reserved points.

The defendant took this writ of error.[2]

Mr. Justice TRUNKEY:[3]

One of the defendants, called by plaintiffs, testified: "The full title of our lodge is Williamson Lodge, No. 309, F. and A. M.; F. and A. M. means Free and Accepted Masons: the purposes of our lodge are charitable, benevolent

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[1] Only so much of the Reporter's statement of the facts of the case as is necessary to understand this point is reprinted.

[2] The Reporter's notes of the arguments of counsel are omitted.

[3] Only so much of the opinion is given as relates to the question raised by the defendant's point recited in the statement of facts.

and social." This is the evidence as to the objects for which the association was formed, and without proof of its constitution or rules respecting admission of members and the management of its affairs it was held to be a common partnership. A partnership has been defined to be a "combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit." It may be formed, not only for every kind of commercial business, but for manufacturing, hunting, and the like, as well as for carrying on the business of professional men, mechanics, laborers, and almost all other employments. It would seem that there must be a community of interest for business purposes. Hence, voluntary associations or clubs, for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners: Parsons on Part., 6, 36, 42.

A benevolent and social society has rarely, if ever, been considered a partnership. In Lloyd *v.* Loaring, 6 Vesey, 773, the point was not made, but Lord ELDON thought the bill would lie on the ground of joint ownership of the personal property in the members of a Masonic lodge; there was no intimation that they were partners. Where a society of Odd Fellows, an association of persons for purposes of mutual benevolence, erected a building, which was afterwards sold at sheriff's sale in satisfaction of mechanics' liens, in distribution of the proceeds, it was said that, as respects third persons, the members were partners, and that lien-creditors, who were not members, were entitled to preference as against the liens of members: Babb *v.* Reed, 5 Rawle, 151. Had the members been called joint-tenants of the real estate, the same principle in the distribution would have applied. In Flemyng *v.* Hector, 2 M. & W. 172, Lord ABINGER stated the difference between a body of gentlemen forming a club and meeting together for one common object, and a partnership where persons engage in a community of profit and loss, and each partner has the right

of property for the whole, and in any ordinary transactions may bind the partnership by a credit. He held that a club and its committee must stand on the ground of principal and agent, and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. After noting the rules of the club, in the case before him, he says: "It therefore appears that the members in general intended to provide a fund for the committee to call upon. I cannot infer that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound?" A mutual beneficial society partakes more of the character of a club than of a trading association. Every partner is agent for the partnership, and as concerns himself he is a principal, and he may bind the others by contract, though it be against an agreement between himself and his partners. A joint tenant has not the same power, by virtue of the relation, to bind his co-tenant. Thus, one of several co-adventurers in a mine, has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of evidence from which an implied authority for that purpose can be inferred: Ricketts *v.* Bennett, 4 M., G. & S. 686, (56 Eng. C. L.).

Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner, so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of the members, had a right to contract debts for the building of a temple, which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking, or subsequently ratified it. Those who

participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge. And so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade.

This unincorporated association had a seal which the officers were authorized to use for certain purposes. Some of those who engaged in the business of borrowing money directed it to be affixed to the certificate of indebtedness. All who did, adopted it as their seal for the specific purpose. It was not the seal of a corporation, nor intended as such. The parties borrowed the money in the name of the lodge, and gave the certificate in same name, and adopted a common seal. They cannot repudiate it in good faith to the lender. He loaned the money on a sealed instrument, in many respects better than a simple contract. Those who advised affixing the seal should be held the same as their officers, who signed the certificate. Were the members partners, without evidence of agreement between them that the seal should be affixed to contracts, those not assenting to its use in that way would not be bound by a sealed instrument, though given for a debt for which all were liable. Schmertz *v.* Shreeve, 12 P. F. Smith 457. The learned judge was right in ruling that the certificate was a sealed instrument, but not, under the evidence, in holding that it was authorized by all the members.

Judgment reversed, and a *venire facias de novo* awarded.

BEECHER *v.* BUSH.

IN THE SUPREME COURT OF MICHIGAN, 1881.

45 *Michigan Reports*, 188.[1]

COOLEY, J. The purpose of the action in the court below was to charge Beecher as partner with Williams for a bill of supplies purchased for the Biddle House in Detroit. The facts are all found by special verdict, and are few and simple. Beecher was owner of the Biddle House, and Williams proposed in writing to "hire the use" of it from day to day, and open and keep it as a hotel. Beecher accepted his proposals and Williams went into the house and began business, and in the course of the business made this purchase. The proposals are set out in full in the special verdict.

The question is whether by accepting the proposals Beecher made himself a partner with Williams in the hotel business; and this is to be determined on the face of the writing itself. It is conceded that Beecher was never held out to the public as a partner, and that the bill of supplies was purchased on the sole credit of Williams and charged to him on the books of the plaintiffs below. The case, therefore, is in no way embarrassed by any questions of estoppel, for Beecher has done nothing and suffered nothing to be done which can preclude him from standing upon his exact legal rights as the contract fixed them.

Nor do we understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership, these parties meant should be

[1] The Reporter's note of the argument of counsel is omitted.

wholly excluded from their arrangement. Some of these were of primary importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the most common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.

It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should "carry the doctrine of constructive partnership so far as to render it a trap to the unwary." Kent, C. J., in *Post v. Kimberly* 9 Johns. 470, 504.

We have then a case in which the party it is sought to charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law.

What then are the *indicia* of partnership in this case; the marks which force that construction upon the court irrespective of the intent of the parties; that in fact control their intent, and give to the parties bringing suit rights which they were not aware of when they sold the supplies?

In the elaborate and able brief which has been presented in behalf of the defendants in error it is conceded that the fact that Beecher was to receive each day a sum "equal to one-third of the gross receipts and gross earnings" for the day, would not necessarily make him a partner. What is claimed is that the fact is "cogent evidence" that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in *Hinman v. Littell* 23 Mich. 484; and in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions. *Eager v. Crawford* 76 N. Y. 97.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportioned to him

regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received, was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words. *Loomis v. Marshall* 12 Conn. 69, 79.

In *Cox v. Hickman* 8 H. L. Cas. 268, 306, Lord Cranworth stated very clearly his views of what should be the test of partnership. * * *

It is said, and we believe justly, in *Bullen v. Sharp* L. R. 1 C. B. 86, that the decision in *Cox v. Hickman* brought back the law of England to what it should be, and Mr. Baron Bramwell, referring to what was declared to be law in *Waugh v. Carver* 2 H. Bl. 235, expressed the hope "that this notion is overruled," adding that it is "one which I believe has caused more injustice and mischief than any bad law in our books." p. 128. It is certainly overruled very conclusively in Great Britain. *Kilshaw v. Jukes* 3 B. & S. 847; *Shaw v. Gault* 16 Irish C. L. R. 357; *Holme v. Hammond*, L. R. 7 Exch. 218; *Ex parte Delhasse* 7 Ch. Div. 511. And though in New York the courts, hampered somewhat by early cases, have not felt themselves at liberty to adopt and follow the decision in *Cox v. Hickman* to the full extent, it would be easy to show that the American authorities in the main are in harmony with it. Indeed that is very well shown in *Eastman v. Clark* 53 N. H. 276, where the authorities are collated. It must be admitted, however, that the attempts at an application of the test to the complicated facts of particular cases have not been productive of harmonious results. A few cases may be mentioned which in their facts have a resemblance, more or less strong, to the one before us.

Champion v. Bostwick 18 Wend. 175, was a case where parties who were severally owners of horses and stages on different parts of one stage line made an arrangement that the fares received by both should be divided between them in proportions agreed upon. This was held to constitute them partners, so that a third person injured by the carelessness of a driver employed by one might bring suit for the negligence of all. But in the somewhat similar case of *Eastman v. Clark* 53 N. H. 276, the conclusion of partnership or no partnership, it was said, must be drawn as one of fact. "The real and ultimate question," says Smith, J. (p. 289), "in all cases like the present, is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of that question, 'except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business.' Whether such relation existed is a question of fact. * * * There is no sound foundation for an arbitrary rule of law requiring courts or juries to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts."

In *Farmers' Ins. Co.* v. *Ross,* 29 Ohio St. 429, it appeared that by arrangement one party furnished the ground and the material for making brick, and also the fuel, and another was at the expense of burning the brick. The brick were then to be divided, the former receiving one-fourth and the latter three-fourths, and the latter was also to pay the former ten dollars on each one hundred thousand bricks. This was held to create a partnership, and *Musier v. Trumpbour* 5 Wend. 274, and *Everitt v. Chapman* 6 Conn. 347, were relied upon as authority.

The New York cases might support this decision, but the case of *Loomis v. Marshall* 12 Conn. 69, can hardly be considered in accord with it. The facts were these: B. had a cloth factory. A. agreed with him to furnish a full supply

of wool for two years, B. to devote the factory for two years exclusively to manufacturing, and the net proceeds, after deducting the incidental expenses and costs of sale, were to be divided in the proportion of 55 per centum to A. and 45 per centum to B., and the cost of manufacture was to be shared in like proportion. This was held no partnership. Says Huntington, J.: "This community of profit is the test to determine whether the contract be one of partnership; and to constitute it, a partner must not only share in the profits, but share in them as a principal; for the rule is now well established that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner." And of the share set off to B. he says it "is not expressed in terms to be for such compensation; but this is its legal meaning." pp. 77, 79. *Moore v. Smith* 19 Ala. 774; *Bowman v. Bailey* 10 Vt. 170, and *Price v. Alexander* 2 Greene (Ia.) 427, may be referred to for similar views.

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Not dissimilar to *Dunham* v. *Rogers*[2] is the case of *Denny v. Cabot* 6 Met. 82, which was also a case in which one party supplied the raw material and another manufactured it, and was to receive one-third part of the net profits. This proportion, it was found, was to be received by the manufacturer only as a compensation for his labor and services; and it was held perfectly competent to provide for making compensation by such a standard without constituting a partnership. *Perrine v. Hankinson* 11 N. J. 181, is relied upon as authority, among other cases. The same doctrine was reiterated in *Holmes v. Old Colony R. R. Co.* 5 Gray 58; *Bradley v. White* 10 Met. 303; and by Day, J., in a careful opinion in *Harvey v. Childs* 28 Ohio St. 319, already referred to.

It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that in so far as

[2] The quotation from the opinion in *Dunham* v. *Rogers, supra,* is omitted.

the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers however by agreement between the parties themselves may be restricted at option, to the extent even of making one the sole agent of the others and of the business.

In this case we have the lawful commerce or business, namely, the keeping of the hotel. We have also in some sense a community of interest in the proceeds of the business, though these are so divided that all the profits and all the losses are to be received and borne by one only. But where in the mutual arrangement does it appear that either of the parties clothed the other with an agency to act on his behalf in this business? We speak now of intent merely, and not of any arbitrary implication of intent which the law, according to some authorities, may raise irrespective of and perhaps contrary to the intent. Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively and charges made in proportion to what they demand, or on the other hand that the tables shall be plain and cheap so as to attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams saw fit to use it? Was a servant in the house at his beck or disposal, or could he

turn off a guest that Williams saw fit to receive, or receive one that Williams rejected as unfit? In short, what one act might he do or authority exercise, which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be principal in a business over which he had absolutely no control? Nor must we forget that this is not a case in which powers which might otherwise be supposed to exist are taken away or excluded by express stipulation; but they are powers which it is plain from their contract the parties did not suppose would exist, and therefore have not deemed it necessary to exclude.

On the other hand what single act are we warranted in inferring the parties understood Williams was to do for, and as the agent of, Beecher? Not to furnish supplies surely, for these it was expressly agreed should be furnished by Williams and paid for daily. Not to contract debts for water and gas bills and other running expenses, for by the agreement there were to be no such debts. Nor was this an agreement merely that expenses incurred for both were to be met without the use of credit, but it was expressly provided that they were to be the expenses of one party only, and to be met by him from his own means. There was to be no employment of credit, but it was the credit of Williams alone that was in the minds of the parties.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was. Beecher furnished the use of the hotel and a clerk to supervise the accounts, and received for so doing one-third the gross returns. It was not understood that he was to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of his contract. If the business was managed badly Beecher might be a loser, but how could he help himself? He had reserved no right to correct the mistakes of Wil-

liams, supply his deficiencies or overrule his judgments. He did indeed agree to take and account for whatever furniture should be brought into the house by Williams, but the bringing any in was voluntary, and so far was Beecher from undertaking to pay to the sellers the purchase price, that on the contrary the value was to be offset against the deterioration of that which Beecher supplied; and it was quite possible that, as between himself and Williams, there might be nothing to pay. And while Williams was not compellable to put any in, Beecher, on the other hand, had no authority to put any in at the cost of Williams.

It is plain, therefore, that if there is any agency in this case for Beecher to act for Williams, or Williams to act for Beecher, it is an agency implied by law, not only without having expressed a purpose that an agency shall exist, but in spite of their plain intent that none shall exist. If therefore we shall say that agency of each to act for the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something in order that that something may be the foundation whereupon to erect an implication of something else is a mere absurdity. The test of partnership must be found in the intent of the parties themselves. They may say they intend none when their contract plainly shows the contrary; and in that case the intent shall control the contradictory assertion; but here the intent is plain.

We have not overlooked any one of the circumstances which on the argument were pointed out as peculiar to this case. None of them is inconsistent with the intent that Beecher was to be paid for the use of his building and furniture merely. He retained possession; but a reason for this appears in the power he reserved to terminate the arrangement whenever the contract was broken by Williams.

Being in possession he might suppose he could eject Williams without suit. He might also think it important to the reputation of the hotel that no landlord should be in debt for supplies or for servants' wages; and for that reason require cash payments. It is easy to see that as lessor he might have had an interest in all the stipulations to which Williams' assent was required.

There is another view of this case that seems to us conclusive. It is urged on behalf of defendants in error that Beecher was a dormant partner. Now a dormant partner is a secret partner; one who becomes such by a secret arrangement, while his associate is held out to the world as sole proprietor and manager of the business. Was this the case here? Nothing in the record indicates it. Beecher was in possession of the hotel, and we must suppose had his clerk there. These were facts open and patent to the whole world who had occasion to go there or to deal with Williams. They naturally suggested the inquiry what was the arrangement between the parties; and there is nothing in the case to indicate that plaintiff in error would not have learned all the details of the arrangement had they made the necessary inquiries. There is no indication anywhere of intended secrecy. If, therefore, there was any partnership at all, it existed because the contract and the open and public conduct of business under it created one, and the right of the defendants in error to recover must depend upon whether they had a right, with the contract before them, to understand that they were furnishing supplies on the credit of Beecher? Would they have had this right? If so, no interference of Beecher, and no notice to them not to sell to Williams relying on Beecher's credit, would have been of the least avail. If he had said to them, "Gentlemen, by our contract Mr. Williams furnishes all the supplies; I do not and cannot control in respect to quality, quantity or cost; he alone, by our understanding, is to pay for them, and I forbid you to sell on my credit;" it would all have been useless. On their view of the case he was

bound by an iron rule of the law, from which it would have been impossible to rescue his credit until the arrangement with Williams should in some manner be terminated. And this would have been the case also even if the arrangement with Williams had been a secret one, and Beecher had attempted to protect himself by disclosing its terms. This is as much as to say that parties are not at liberty to contract as they please, even when they propose nothing wrong and do nothing unfair to any one. But we cannot bring our minds to this result.

Our conclusion is that Beecher and Williams, having never intended to constitute a partnership, are not as between themselves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting in equity. If either had died, the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled by concealment of facts or by deceptive appearances.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.[3]

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[3] *Compare: Smith* v. *Knight,* 71 Ill. 148, 1873. (A was a commission merchant, who apparently sold on time, and cashed the sales for his principals. To obtain the money necessary to carry on the business in this way, he made an agreement with B, by which B lent A the money he should need up to a certain sum, and A paid B 10 per cent. interest on the average balance advanced, and one-half his, A's, commissions after B had deducted a certain sum for office expenses. A also assigned his "books, accounts, drafts or claims" which he had or would have for advances on sales or commissions to B. B having authority to collect or compromise the same; out of the proceeds B paid himself the cost of collection and his, B's, share of the commissions and gave the overplus to A. *Held,* that this agreement did not make B a partner of A as to third persons.)

Harvey v. *Childs,* 28 O. St. 319, 1876. (A ordered hogs, but had not

the money to pay for them. A agreed with B, that B would loan A the money, B to have possession of the hogs, as security, sell and retain half the profits. If there was any loss, A would repay. *Held,* A and B were not partners; that A was a mere lender and bailee, and that D, who sold the hogs to B, could not recover the price from B.) *Accord: Johnson* v. *Miller,* 16 O. 431, 1847.

Kellogg Newspaper Co. v. *Farrell,* 88 Mo. 594, 1886. (A, an owner of a newspaper, leased it to B, who was to run the paper "as if owner," pay all expenses and divide half the net profits. A was allowed to sell half the business, and in such case he, A, was to lease the other half to B. A reserved the right to control the "general and political policy of the paper." C, who supplied B with materials used in conducting the paper, sued A as partner. The trial Judge refused to instruct the jury that the agreement made A and B partners as to third persons. Judgment for the defendant affirmed, the Appellate Court declaring that the trial Judge "would have been justified in instructing the jury that the plaintiff could not recover.")

Meehan v. *Valentine,* 145 U. S. 611, 1892. (C sued A as B's partner. He proved an agreement between A and B in which A agreed to loan B $10,000, and B agreed to pay A interest and one-tenth of the profits over $10,000; that the agreement was for one year; that A had loaned the money and that the agreement was renewed from year to year. A obtained a non-suit. Judgment affirmed.)

Thillman v. *Benton,* 82 Md. 64, 1895. (A agreed to lend, and did lend, $2,000 to B and C for their business; B to act as manager of the business and draw out $15 per week. At the end of the year B and C were to pay A $2,000 and an amount equal to one-third of the profits. *Held,* that the agreement did not make A a partner of B and C.)

Bradley v. *Ely,* 24 Ind. App. 2, 1900. (A, an owner of a farm, leased it to B, B agreeing to pay for one-third of the personalty on the farm. At the end of the association the personalty was to be sold. B was to manage the farm and to plant such crops and sell at such price as A and B should mutually agree upon; two-thirds of the profits to go to A and one-third to B. B executed a note to C for money to pay off an indebtedness incurred in running the farm. C sued A and B as partners. Judgment for C. A's motion for a new trial, on the groound that the agreement was not sufficient evidence of partnership to go to the jury, granted on appeal.)

Estabrook v. *Woods,* 192 Mass. 499, 1906. (Under an agreement between A and B, A gave B $200 and procured for B a stock of cigars. B was to return the money and price of the goods at all events. B also gave A a chattel mortgage on all the goods in his, B's, cigar store, agreed to devote his time to the store, and from the proceeds to pay, first, the expenses; second, interest due A; third, $20 per week for his, B's, own use; fourth, one-half of the balance to A. A was sued as a partner of B. Judgment for plaintiff reversed on appeal.)

It is suggested that the student discuss in connection with the foregoing cases the following:

State National Bank of Springfield v. *Butler,* 149 Ill. 575, 1894. (A owned and operated a mine. A sold a one-fourth interest in the mine to B for $13,000, A reserving the right to a royalty on all coal mined; the right to control the operation of the mine, and agreed to account to B each month for one-fourth of the profits. *Held,* that the agreement made A and B partners as to third persons in the operation of the mine.)

Merrall v. *Dobbins,* 169 Pa. 480, 1895. (The parties submitted the following "case stated" to the Court: By an agreement in writing, D leased a hotel with all the personal property on the premises for three months to G for $20,000, payable in four equal installments. D was not to be liable for the business done, or for the debts contracted by G. The agreement designated by the parties as a lease further provided

(1) that G shall give his undivided attention and devote his best energies to the promotion of the business to be done on the said premises; (2) that D or his representatives shall have the right of free access to the premises at all times; (3) that in addition to the sum of $20,000 D shall have 80 per cent. of the net profits derived from all of the business done on the premises; (4) that in addition to the current expenses of the hotel and the business done therein there shall be charged to the expense account the cost of insurance, water and sewer rents, license fee, interior repairs, and the salary of a person to be designated by D, who shall keep the books and act as cashier, receive all money, deposit it in his own name, and make all payments; (5) that at the termination of the agreement a statement shall be made of the business done, and that G shall receive 20 per cent. of the net profits; (6) that at the expiration of the lease D shall pay to G $1,000, and that D shall have the right at any time upon twenty-four hours' notice to annul the agreement and assume sole and exclusive possession of the property; (7) that G shall have absolute control and management of the business during the continuance of the agreement, and assent to a transfer of the license if the agreement shall be annulled. *Held*, that the agreement constituted a partnership between D and G, as to third parties, and that D was liable for debts contracted by G in the conduct of the business.)

HACKETT *v.* STANLEY.

IN THE COURT OF APPEALS OF NEW YORK, 1889.

115 *New York Appeals Reports,* 625.

APPEAL by defendant Stanley from a judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made April 4, 1887, which affirmed a judgment of the General Term of the City Court affirming a judgment in favor of plaintiffs, entered upon a decision of the court on trial without a jury.

This action was brought against defendants, as alleged copartners, for materials and labor in fitting up the premises used in the firm business.

The facts, so far as material, are stated in the opinion.[1]

RUGER, Ch. J. The determination of this case involves the construction of an agreement between James Stanley and Moulton W. Gorham, and the question whether such agreement constituted the defendant Stanley a partner as to third persons with Gorham. If it did, then the judgment must be sustained.

The liability of the alleged partners is predicated upon a debt for services rendered and materials furnished by the plaintiffs, upon the request of Gorham, in fitting up a place in New York to carry on the business of heating, ventilating, etc.

The part of the agreement which, it is claimed, creates the partnership, reads as follows: "That for and in consideration of the loan of seven hundred and fifty ($750) dollars from the said party of the second part to the said

[1] The Reporter's notes of the arguments of counsel are omitted.

party of the first part, for use in the business of heating, ventilating, etc., for which said party of the first part has given unto said party of the second part his note at two years, with interest, bearing date of January 14, 1885, payment of which is secured by an assignment of said value in a certain $3,000 policy in the Massachusetts Mutual Life Insurance Company, and also by a certain chattel mortgage, bearing date January 23, 1885, *and in further consideration of services of said party of second part in securing sales in said business and for any further moneys he may, at his own option, advance for use in said business,* the said party of the first part agrees to divide equally the yearly net profits of said business. It is understood and agreed that said loan of seven hundred and fifty dollars is expressly for use in said business and for no other use whatever." It was further provided that advances made by either party in the business were at all times subject to be withdrawn at the option of the party making them, and were to bear interest while used in the business. Gorham was to be allowed $1,000 per annum for his services in managing the business, and quarterly statements of its condition were to be made by him to Stanley.

It is fairly to be implied from the contract that Gorham was to be the active man in the business, and it was to be carried on in his name; but whether he was to furnish any capital, and if so, how much, is not disclosed. For aught that appears the money furnished by Stanley was all that was supposed to be necessary, to start and carry on the business until returns were realized from its prosecution.

This agreement does not, in express terms, purport to form a partnership; neither is the intention to do so disclaimed, and the question is, therefore, whether, in a business carried on under the conditions provided for in the contract, the parties thereto became partners as to third persons. It clearly provides for something more than a

loan of money, as it is fairly to be implied from it, that Stanley would render active services as a principal in the prosecution of the business, and furnish further financial aid therefor if it became necessary, and he deemed it advisable to do so. The loan was not one made to Gorham generally, but was for the benefit of the particular business in whose prosecution Stanley had an equal interest, and any diversion of the funds from such use was strictly prohibited. Each party was authorized to charge the business with interest on the funds advanced by him for its prosecution, and they would each be entitled to *pro rata* reimbursement of such funds from the assets of the business in case of a deficiency of funds to pay the advances in full. In that respect it was evidently contemplated that each party should bear any loss incurred in proportion to the advances made by them respectively. For all this Stanley was to receive one-half the net profits of the business. His right to profits would not cease upon the repayment of the original loan, or depend upon the value of the services rendered or moneys advanced, or either of them alone, but was to continue as long as the business was carried on. The letter of the contract is that, in consideration of the loan of $750, payable in two years, and the *further consideration* of services in securing sales in said business, and further moneys furnished, the net profits are to be divided. The services promised, and the moneys advanced and to be advanced, each and all constituted the consideration for the division of the profits.

We think such an agreement, within all authorities, constitutes a partnership as to third parties. By it Stanley had an interest in the general business of the concern; a right to require a quarterly account of its transactions; authority to make contracts in its behalf, and an irrevocable right to demand one-half of the profits of the business. That the original loan of $750 was secured to be repaid by Gorham to Stanley does not preclude the conclusion

that they were partners, for it is entirely competent for one partner to guarantee another against loss, in whole or in part, in a partnership business, if the parties so agree.

The application of the rule that "participation in profits" renders their recipient a partner in the business from which profits are derived, as to third persons, has been somewhat restricted by modern decisions, but we think that the division of profits must still be considered the most important element in all contracts by which the true relation of parties to a business is to be determined. We think this rule is founded in strict justice and sound policy. There can be no injustice in imposing upon those who contract to receive the fruits of an adventure, a liability for credits contracted in its aid, and which are essential to its successful conduct and prosecution. This liability does not, and ought not, to depend upon the intention of the parties in making their contract to shield themselves from liability; but upon the ground that it is against public policy to permit persons to prosecute an enterprise which, however successful it may for a time appear to be, is sure in the end to result in advantage to its secret promoters alone, and the ruin and disaster of its creditors and others connected with it. (*Atherton* v. *Tilton,* 44 N. H. 452; *Chase* v. *Barrett,* 4 Paige, 159.) Expected profits being the motive which induces the prosecution of all commercial and business enterprises, their accumulation and retention in business is essential to their success; and if persons are permitted, by secret agreement, to appropriate them to their own use and throw the liabilities incurred in producing them upon those who receive only a portion of the benefits, not only is a door opened to the perpetration of frauds, but such frauds are rendered inevitable.

Exceptions to the rule are, however, found in cases where a share in profits is contracted to be paid, as a measure of compensation to employes for services rendered in the business, or for the use of moneys loaned in aid of

the enterprise; but when the agreement extends beyond this and provides for a proprietary interest in the profits as a compensation for money advanced and time and services bestowed, as a principal in its prosecution, we think that the rule still requires such party to be held as a partner.

The rule laid down in Kent's Commentaries (vol. 3, 25), that "the test of partnership is a community of profit; a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services," was approved by this court in *Leggett* v. *Hyde* (58 N. Y. 272), in which case Judge FOLGER says: "The courts of this state have always adhered to this doctrine and applied or recognized it in the cases coming before them." After citing numerous cases in support of the statement, he proceeds: "There have been from time to time certain exceptions established to this rule in a broad statement of it, but the decisions by which these exceptions have been set up still recognize the rule that, where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker or employe, who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the profits." The learned judge, after referring to the English cases claimed to have qualified, if not overruled, the cases of *Grace* v. *Smith* (2 W. Black, 998), and *Waugh* v. *Carver* (2 H. Bl. 235), which were the foundation of the doctrine that a participation in profits renders those receiving them partners, says that "without discussing those decisions and determining just how far they reach, it is sufficient to say that they are not controlling here, that the rule remains in this state as it has long been, and that we should be governed by it until here, as in England, the legislature shall see fit to abrogate it."

The same remark may also be applied to the cases of *Harvey* v. *Childs* (28 Ohio St. 319); *Hart* v. *Kelley* (83

Penn. 286); *Beecher* v. *Bush* (45 Mich. 188); *Eastman* v. *Clark* (53 N. H. 276); *Emmons* v. *Westfield* (97 Mass. 230), decided in the courts of our sister states, in which the distinction between contracts of partnership *inter sese* and those making the parties partners as to third persons, although not so as between themselves, is sought to be practically abolished.

The doctrine that persons may be partners as to third persons, although not so as between themselves, and although the contract of partnership contains express provisions repudiating such a relation, has been too firmly established in this state, by repeated decisions, to be now disregarded by its courts. (See cases cited in *Leggett* v. *Hyde.*)

It is claimed that this doctrine has been practically overruled in this state by the decisions, in this court, of *Richardson* v. *Hughitt* (76 N. Y. 55); *Burnett* v. *Snyder* (Id. 344); *Eager* v. *Crawford* (Id. 97); *Curry* v. *Fowler* (87 id. 33) and *Cassidy* v. *Hall* (97 id. 159).

We do not think these cases had the effect claimed. They were all cases distinguished by peculiar circumstances taking them out of the operation of the general rule. It cannot be disputed but that a loan may be made to a partnership firm on conditions by which the lenders may secure a limited or qualified interest in certain profits of the firm without making them partners in its general business, but that is not this case.

In *Richardson* v. *Hughitt* (*supra*), Bench Bros. & Co. were a manufacturing firm, carrying on the business of making wagons, and Hughitt contracted to advance to them $50 on each wagon manufactured by them and delivered to him, to the extent of two hundred wagons, under an agreement that upon the sale of the wagons he was to receive back the moneys advanced, with interest, and one-fourth of the net profits on such wagons. It was held that this was a mere loan of money providing for an interest in the profits as a compensation for the money loaned.

The lender secured no interest in the general business of the firm or interest in the profits made therein, and did not become liable for its debts. It is quite clear that if such a contract had been made after the wagons were finished, it would have created simply a pledge of property for the payment of a debt, competent for the parties to make and which would not have made the pledgee a partner. The fact that the contract was executory would not alter the real nature of the transaction, or affect the relations of the parties to third persons.

The case of *Eager* v. *Crawford* (*supra*) was a pure loan of money with an agreement that the borrower should pay to the lender on the first day of each month one-half of the gross receipts of the business carried on by him until the whole sum, with interest, was repaid. The dispute in the case was upon the question whether the stipulation for one-half the gross receipts was intended to refer to profits. The question submitted to the jury, the evidence being conflicting, was whether it was "the real understanding between the parties that Crawford should participate in the profits, as such; if it was, it would constitute a partnership," otherwise not. This court approved the charge.

In *Burnett* v. *Snyder* (*supra*), two of the members of an existing firm, composed of five persons, agreed with Snyder, for a good consideration, that if he would become liable to them for one-third of the losses sustained by them in the business of their firm, they would pay to him one-third of the profits received by them in such business. For obvious reasons it was held that Snyder, under this agreement, took no interest in the general business of the firm, and did not become a member thereof.

In *Curry* v. *Fowler* (*supra*) W. G. and J. E. McCormick were an existing firm owning certain vacant real estate in New York, which they desired to improve. To enable them to do so Fowler loaned $50,000 to them, taking as security therefor a mortgage upon the land, with an agreement that he should be repaid his loan and interest,

with one-half of the profits of the adventure, which the McCormicks guaranteed should amount to $12,500. This case was decided upon the authority of *Richardson* v. *Hughitt* and was said to resemble it in all essential particulars.

In *Cassidy et al.* v. *Hall* (*supra*), it was held that the defendants were mere lenders of money to an existing corporation. The opinion states that "under the agreement the advances were to be made only upon such orders as the defendants approved, and the most that can be claimed from it is that the defendants were the financial agents of the company to make advances and discount their paper for the purpose of relieving the company from the financial embarrassment under which it was evidently laboring, for which they, the defendants, were to receive a proportion of the face of the orders, upon which the advances were made, as a compensation for the risks they incurred and for the use of the money advanced by them. They were not generally interested in the affairs of the company; but only for a special and specific purpose, and in no sense were they partners."

It cannot reasonably be claimed that either of these cases is an authority for the reversal of this judgment. Whatever might have been their bearing if they related to the loan of money alone, we will not say; but when connected with the circumstance that the defendant was expected to render future services as a principal and furnish further financial aid, with a certain supervision over the conduct of the business, we think this case is clearly distinguishable from those cited.

In the view taken of this case, it is quite immaterial whether the plaintiff extended the credit to Gorham alone or not, as the defendant was held liable upon the ground that as to third persons he was a partner, and it did not affect that liability, whether the plaintiff knew the fact or not.

The exception to the ruling of the court sustaining the objection to the question put to plaintiff on cross-examination, as to whom the credit was furnished, was not well taken, as the fact sought to be proved was immaterial.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

MUIR *v.* CITY OF GLASGOW BANK.

IN THE HOUSE OF LORDS, 1879.

Law Reports, 4 Appeal Cases, 337.

William Muir, William Thompson, *et al.*, trustees for Mrs. Syme and Mrs. Boyd, accepted as part of the trust estate, stock in a Scotch banking company. By the deed of co-partnership, there was to be no limit whatever to the shareholders' liability. They signed the deed of transfer "as trust disponees," and accepted the stock "as trust disponees aforesaid, subject to the articles and regulations of the said company in the same manner as if they had subscribed the contract of co-partnership." Their names and addresses were entered in the stock ledger (the register of shareholders), followed by the words "as trust disponees" for Mrs. Syme and Mrs. Boyd. The individual names of William Muir, William Thompson, *et al.* did not appear in any list of shareholders issued to the public.

The bank suspended payment with immense liability. The liquidators placed William Muir, William Thompson, *et al.* on the first part of their list of contributories as liable to calls "in their own right." A petition was filed by William Muir, William Thompson, *et al.* to rectify the list of contributories, by transferring the names of the petitioners from the first part to that part entitled "second part—contributories as being representatives of others."

The Court of Sessions unanimously held that the trustees were personally liable to pay all calls made in respect to the shares they held. [Court Sess. Cas., 4th Series, vol. vi, p. 392; Scot. Law Rep., vol. xvi, p. 147.]

From this decision the trustees appealed.[1]

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[1] The facts are restated, and the Reporter's notes of the arguments of counsel are omitted.

Lord Penzance: The question involved in this appeal, though one of the deepest interest to the parties concerned, does not depend for its solution upon any very numerous or intricate considerations.

It is not to be denied that the appellants, on the face of the transfer deed into which they entered with the banking company and whereby they became shareholders in it, announced in express terms that they did so "as trust disponees" for other people.

The question is, whether the statement of this fact has in any degree exonerated them from the obligations which attached to the character and position of shareholders which it was the object of that deed to confer upon them.

Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided. A general consideration of this character has, I think, largely pervaded the reasoning upon which the exemption of the appellants from personal liability has been based and enforced in argument.

But meanwhile it will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability on those debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted.

The case of an agent who acts for others is, of course, entirely different. His contracts are the contracts of his principal; and the liabilities from which, as a general rule,

he is personally exempt, fall upon his principal who acted through him.

But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to shew that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject-matter—the intention of the parties to that contract was apparent that his personal liability should be excluded; and that although he was a contracting party to the obligation the creditors should look to the trust estate alone.

These propositions are, I conceive, conformable to the law of Scotland, equally with that of this country.

It is not enough, then, in the present case, to shew that the appellants on the face of the transfer deed accepted the "stock" in question "as trustee disponees;" but they must go on to shew that the proper construction of that instrument shewed the intention of the parties to be that, being trustees, they should not be personally liable.

It becomes, then, material to inquire what was the nature of the partnership whose "stock" they agreed to accept, and in whose business they agreed to become partners—and how far the nature of that "stock," and the constitution of that partnership, is consistent with the exemption which they now claim.

* * * * * * * * *

Having thus become shareholders in a partnership the members of which have by their deed of partnership agreed to stand upon an equal footing, one with the other entitled equally to the profits, and bound equally to the losses,—the question is raised whether, by stating in their deed of transfer that they so became shareholders as trust disponees for other persons, the appellants have altered or limited the

obligations that otherwise would attach to them. In my opinion they have not.

There are many contracts in respect of which if a man were to state, in contracting, that he only did so as trustee, it is quite conceivable that his contract might be construed as not being intended to bind himself personally. The case of *Gordon* v. *Campbell* [1 Bell's App., 428] offers an example of such a construction.

Other cases may be easily imagined in which on the one hand the intention to restrict the liability of the person contracting may be clearly inferred from the character in which he declared that he contracted, taken in connection with the other circumstances of the case, and in which, on the other hand, nothing is to be found inconsistent with that restriction in the subject-matter of the contract.

But in this case the subject-matter of the contract was the "stock" of an association whose shares were, by the very terms of its constitution, to be held only by persons who were all to be personally, and equally, liable to its obligations—and it cannot be held that the liabilities in respect of this "stock" were intended to be restricted by the words "as trust disponees" without ignoring the very nature and inseparable incidents of the thing which formed the subject-matter of the contract.

In a word, it comes to this:—Such a thing as a share in this association, with a limited liability in the holder of it, did not exist—no such share or "stock" had ever been created—no provision is made for it in the partnership deed, and every provision to be there found which speaks of the liability of those who hold the shares is diametrically and in the most express language opposed to it. If, then, the appellants did not become bound to the liabilities attaching to ordinary shares, and ordinary shareholders, they did not become bound at all, and the contract of transfer would be void.

But before your Lordships can arrive at such a con-

clusion you must, I think, be at least satisfied that the words "as trust disponees," in this particular deed, so clearly imported an intention not to undertake the obligations of shareholders (though the entire contract might thereby be rendered contradictory and absurd) that they could have been introduced for no other purpose. For if a reasonable interpretation can be assigned to these words, which would permit the deed to stand as a consistent one competent to effect that transfer of stock which it was the obvious intention of the parties to bring about, your Lordships would be bound to accept that interpretation.

Such a reasonable interpretation was suggested in the case of *Lumsden* v. *Buchanan* [Court Sess. Cas. 3rd Series, vol. ii, p. 695, and vol. iii, (H. L.) p. 89; 4 Macq. 950], and is referred to by the Lord President in his judgment in the present case. His Lordship says: "Hence arose the practice referred to in *Lumsden* v. *Buchanan* of taking notice of trusts in the transference and registration of such stocks, not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register." [Scottish Law Reporter, vol. xvi, p. 147; Court Sess. Cas., 4th Series, vol. vi, p. 400.]

The whole question then is, as it seems to me, one of construction as to the proper interpretation to be put upon this transfer deed and the acts of the appellants under it, and for the solution of that question your Lordships have before you these two alternatives—on the one hand a construction which gives a reasonable and efficient meaning to the words "as trust disponees" and is not inconsistent with that transference and acceptance of "stock" which was the sole object of the instrument—and on the other hand a construction which defeats the intended transfer of stock altogether, and reduces the deed of transfer to a nullity.

According to all known principles of construction, your Lordships are, I apprehend, bound to accept the construction which gives effect to the instrument.

* * * * * * * * *

I have offered these remarks to the House upon the footing of the matter being *"res integra,"* but in truth the present case is, in my opinion, governed in principle by the case of *Lumsden* v. *Buchanan.*

What the principle involved in that decision was, is, I think, rightly appreciated and declared by the learned Judges in the Court of Sessions.

The Lord President said the rule of liability then established might be stated in a single sentence, as follows: "Persons becoming partners of a joint stock company such as the *Western Bank,* and being registered as such, cannot escape from the full liabilities of partners, either in a question with creditors of the company, or in the way of relief to their co-partners, by reason of the fact that they hold their stock in trust for others, and are described as trustees in the register of partners, and the other books and papers of the company." And Lord Deas said that the grounds of decision in *Lumsden* v. *Buchanan* "resolved themselves into this, that where trustees join in a contract of partnership for trading purposes, such as a contract for carrying on the business of banking, the mere designation of them as being trustees will not exempt them from the same personal liability as is undertaken by the other partners, or limit their liability to the value of the trust estate."

[Earl Cairns, L. C., and Lords Hatherley, O'Hagan, Selborne and Blackburn being of the same opinion, on motion of the Lord Chancellor the appeal was dismissed with costs.][2]

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[2] The opinions of the other learned Lords are omitted.

WILD *v.* DAVENPORT.

In the Court of Errors and Appeals of New Jersey, 1886.

48 New Jersey Law Reports, 129.

On a writ of error to Somerset Circuit.

James S. Davenport, Edward L. Vorhees, William S. Johnson and James B. Davenport entered into partnership under the firm name of Davenport, Johnson & Co., by articles of copartnership dated November 1st, 1880. The articles provided that the copartnership should commence November 1st, 1880, and continue for the term of three years. The copartnership articles contained a provision that in case any of the said parties should die before the expiration of the copartnership, the sum standing to his credit at that time in the assets of the firm should remain as a part of the capital of the firm until the expiration of the copartnership, and at the expiration of the copartnership all moneys contributed to the capital of the firm by any of the members of the firm should first be repaid to such contributor out of the assets of the firm before any division of the profits should be made.

Johnson died in July, 1881, leaving a will appointing the defendants in error executors. He had contributed $15,000 of capital, and at his death, $17,000 were standing to his credit. This sum continued in the business until the expiration of the partnership on October 31st, 1883. The business was carried on by the surviving partners. The executors examined the books and accounts of the firm from time to time, but did not otherwise interfere with or participate in the business. It did not appear that any profits were ever received by them from the business, or that the capital standing in the deceased partner's name was ever withdrawn by them.

In October, 1883, plaintiff sold the firm of Davenport, Johnson & Co., a bill of merchandise, and this suit was brought against the surviving partners and the executors of the deceased partner, to charge them personally jointly as partners.

The judge at the Circuit decided that the executors of the deceased partner could not be held personally liable as partners.

DEPUE, J. The bill of exceptions in this case presents the single question whether, upon the facts stated, the defendants in error, executors of the deceased partner, became personally liable as partners for debts contracted by the firm after the death of the testator.

Partnership is a relation arising from contract. It is usually defined to be a voluntary contract between competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, upon the understanding that there shall be a communion of the profits thereof between them. *Story on Part.*, § 2; 3 *Kent* 23. Mr. Justice Lindley quotes from "Words of Celebrity" a number of definitions of partnership, in all of which the elements of contract or agreement is fundamental. 1 *Lind. on Part.* 2 *Inter esse* the fact of partnership, as well as the rights, duties and obligations of partners, arises wholly from the terms of the contract, and as to third persons and creditors the same rule prevails, except where the persons concerned have held themselves out as partners—have acted ostensibly as interested in the business as if they were partners in it, and have so conducted themselves as to lead people to suppose that they were willing to be regarded by them as if they were partners in fact. 1 *Lind. on Part.* 47; *Central Savings Bank* v. *Walker*, 66 N. Y. 424; *Mershon* v. *Hobensack*, 2 Zab. 372; 3 *Id.* 580.[1]

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[1] His discussion of the cases reprinted in this section is omitted.

The decisions germane to the particular case now before the court have gone upon the same principle. As a general rule, the death of one partner works a dissolution of the partnership. If an executor engages in business, either as a sole trader or in a partnership, with the testator's assets, though he does it as executor, and not for his individual benefit, he will be personally liable for the debts incurred in the business, and this although he does so in compliance with directions in the testator's will, or in conformity with articles of partnership to which the testator was a party which provide, as articles of partnership sometimes provide, that on the death of a partner his executor or personal representatives shall be admitted into the firm. *Wightman* v. *Townroe,* 1 M. & S. 412; *Labouchere* v. *Tupper,* 11 Moore P. C. 198, 221; *Laible* v. *Ferry,* 5 Stew. Eq. 791; 2 *Lind. on Part.* 1060, 1061; *Story on Part.,* § 70.

A provision in articles of partnership that on the death of a partner his executor or personal representative, or some other person, shall be entitled to the place of a deceased partner in the firm, with the capital of the deceased in the firm business, or some part of it, is binding upon the surviving partner to admit the executor, personal representative or nominee of the deceased partner, but does not bind the latter to come in. They have an option to come in or not, and a reasonable time within which to elect. *Pigott* v. *Bagley,* 1 McC. & Y. 569; *Madgwick* v. *Wimble,* 6 Beav. 495; *Downs* v. *Collins,* 6 Hare, 418; 2 *Lind. on Part.* 852. An executor or nominee of a deceased partner coming in under such a provision in partnership articles comes in as a partner, with all the rights and liabilities of a partner, and consequently becomes personally liable for debts contracted in the business. He is made personally liable for debts for the reason that he has of his own volition engaged in the business as a principal, and is a contracting party. As was said by Lord Eldon, in *Ex parte*

Garland, 10 Ves. 119, "he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of liability;" and if he has acted in compliance with the testator's directions, he will be entitled to indemnity out of the testator's estate to the extent of the fund which the testator has embarked in the business, and no further. *Ex parte* Garland, 10 Ves. 109; *In re* Johnson, 15 Ch. Div. 548; *Laible* v. *Ferry,* 5 Stew. Eq. 791; *Burwell* v. *Mandeville's* Ex'rs, 2 How. (U. S.) 560.

On the other hand, a stipulation in partnership articles, that upon the death of a partner his capital shall remain in the business until the expiration of the prescribed term of the partnership, is binding as well upon the estate of the deceased as upon the surviving partner. *Scholefield* v. *Eichelberger, 7 Pet.* 586; *Burwell* v. *Mandeville's Ex'rs, 2 How. (U. S.)* 560; *Downs* v. *Collins, 6 Hare* 418, 437; *Story on Part.,* § 261 *a.* Where the provision in the partnership article is simply that the deceased partner's capital shall remain in the business, the executor is not admitted into the management of the business. The control of the business is with the surviving partner. The executor cannot withdraw the capital of the deceased partner without subjecting the estate to liability to suit, nor can he exercise the control of a partner in the conduct of the business. In this situation none of the reasons for the liability of a partner exist as against him. Hence it is that when by the articles of partnership a new member is brought into the firm on the death of a partner, as an executor or trustee, firm creditors becoming such after the partner's death have the personal liability of the admitted member of the firm; but where by the articles the capital only of the deceased partner is continued in the firm without any person being added, such creditors have only the liability of the surviving partner, by whom the business is carried on, and the security of that part of the estate of the deceased partner which is left in the business. *Parsons on Part.* 454.

Holme v. *Hammond, L. R., 7 Exch.* 218, is a case exactly in point. In that case three persons agreed, by articles of partnership, to conduct business for a term of seven years, with a provision that if either died during the partnership term, the surviving members were to continue the business upon the terms expressed in the articles of partnership, and, for the residue of the term, to pay the representatives of such deceased partner the share of the profits he would have been entitled to if living. One of the partners died during the partnership term, and the surviving members continued the business. The executors of the deceased partner never interfered in the business, but they claimed the share of profits the deceased would have been entitled to. No settlement of accounts respecting the interest of the deceased partner in the partnership business had been made, but a sum had been paid his executors generally, part of which would be applicable to profits realized after his death. In an action for a debt contracted after his death, against the executors of the deceased partner and the surviving partner, the Court of Exchequer held that the executors could not be held as partners. Kelly, Chief Baron, speaking of judicial *dicta* to the effect that the mere participation in profits made the participator a partner, said that looking to the decisions themselves in which the question had arisen, it would be seen that in no case had the party sought to be charged been held liable, except where a contract of copartnership had been entered into; that whenever the plaintiff had failed to establish a contract of copartnership the action had failed; that upon the death of one partner the partnership was dissolved by operation of law, and the surviving partners from that time carried on the business; but that this was, in contemplation of law, a new partnership, and the executors of the deceased partner could not become partners with the survivors without some agreement, express or implied, to which they were parties. Martin, Baron, said that the defendants did nothing more than claim and receive profits under the articles of partnership,

and that in his opinion that act did not make them liable to the plaintiff's demand; that they did nothing in their own behalf at all; they merely did that which a court of equity would have compelled them to do as executors under the will, and that it would be contrary to reason to hold them liable by that act to a responsibility which must of necessity be borne by them in their own personal capacity, and paid out of their private funds. Bramwell, Baron, assigned, as the ground of his judgment, that the representatives of the deceased partner were not to be partners with the survivors; that they could not interfere with the business or its management in any way—could not say that any particular business should be done by the firm, or that it should not be done, or how it should be done; that they could neither make, nor order a contract, nor forbid, nor perform, nor enforce, nor release one.

In *Holme* v. *Hammond* there was not, in fact, any capital belonging to the firm at the death of the deceased partner, except office furniture of the value of £100, and the articles of partnership did not provide for the continuance of a deceased partner's capital in the firm, though it contained a provision that each partner should contribute capital and share profits and losses equally. Kelly, Chief Baron, and Martin and Cleasby, Barons, intimated an opinion that the result would have been different if the executors had voluntarily left capital belonging to the deceased in the firm. That question does not arise in this case. Here the articles of partnership provided for the retention of the testator's capital in the firm until the expiration of the term of the partnership, and the executors did nothing of their own volition, but simply conformed to the obligation entered into by the testator.

The cases in which the precise question has been raised which this bill of exceptions raises are few. The cases cited by the plaintiff in error from the English and American courts are those in which the personal liability of an executor voluntarily engaging in business with his testator's as-

sets has been adjudged, or the extent of the right of partnership creditors to charge the estate of a deceased partner for debts contracted after his death has been involved. *Wightman* v. *Townroe; Labouchere* v. *Tupper; Ex parte Garland; Edgar* v. *Cooke,* 4 *Ala.* (*N. S.*) 588; *Thompson* v. *Brown,* 4 *Johns. Ch.* 619; *Stanwood* v. *Owen,* 14 *Gray,* 195, are cases of this class. The only cases in American courts presenting directly the question raised in this case that have come under my observation are *Owens* v. *Mackall,* 33 *Md.* 382, and *Richter* v. *Poppenhuysen,* 39 *How. Pr.* 83, and both of these decisions are with the defendants in error.

Nor did the defendants become partners in the business by reason of their examination into the affairs of the firm. This was a duty they performed in the execution of the trust arising out of their executorship. Nor are the rights of the creditors of the deceased partner to have the estate of the testator settled up, and their debts paid at all involved in this controversy. When the contingency arises upon which the payment of the testator's debts is involved, a court of equity will be competent to afford them adequate relief against tying up the estate of the testator to the prejudice of his creditors.

Upon the case presented we think that the decision of the learned judge that the defendants in error were not liable was correct, and the judgment should be affirmed.

SECTION 2.—LIABILITY ON CONTRACT CONTINUED—CONTRACT WITHIN THE SCOPE, BUT NOT FOR THE BENEFIT OF THE BUSINESS.

LANE *v.* WILLIAMS.

IN THE HIGH COURT OF CHANCERY, 1692.

2 Vernon's Reports, 277, 292.[1]

J. S. and defendant *Williams* testator were partners as woollen-drapers, *J. S.* gives a note to the plaintiff for 150l. received and borrowed of him, which he promises to repay, and subscribed it for himself and partner. The bill was for a discovery and satisfaction out of the assets against *Williams* the executor of the surviving partner, to oblige him to pay, it being insisted for the defendant at the *Rolls,* that this money was never brought into trade, nor was contracted upon the account of the partnership; and therefore, although one partner signed it, as for himself and partner, *that* could not bind the partner that was not privy nor consenting thereunto; and the master of the *Rolls* dismissed the bill.

Per Cur. The money being paid at the shop, the note of one partner binds both: and tho' at law the note stands good only against the executor of the surviving partner, who was *Newberry,* who received the money, and signed the note, yet proper in equity to follow the estate of *Williams* for satisfaction; and decreed it accordingly.[2]

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[1] There are two reports of this case in Vernon. The statement of facts here printed is taken from the first report, the final action of the Court is from the second report.

[2] *Accord:* Sutton *v.* Gregory, 2 Peake, 150, 1797; Sanderson *v.* Brooksbank, 4 C. & P., 286, 1830; *Ex parte* Bushell, 3 M. D. & De G., 615, 1844.

Compare: Wintle *v.* Combes, 1 C. & J. 316, 1831. (A and B were partners, B being a secret partner, trading under the name of, "A & Co." A raised money for his own purposes from C by accepting a

bill of exchange as "A & Co." *Held,* that the undisclosed or secret partner was liable on the acceptance.)

Potter *v.* Price, 3 Pitts. (Pa. Sup. Ct.) 136, 1869. (A and B were in partnership. Action against firm on note signed in firm name. Judgment for want of a sufficient affidavit of defense. Appeal. Williams, J.: "The affidavit of defence, filed by Potter in this case, alleges that the due bill upon which suit is brought was not given for goods or money on account of the said firm, and was never used in the business of the said Potter & Jones, but was given by James N. Jones for money borrowed of the plaintiff for his own sole and individual use and benefit, and without the knowledge of the deponent. But there is no averment that the plaintiff knew that the money was borrowed by Jones for his individual use and benefit, or that he had notice of any facts that ought to have put him on inquiry, and in this respect the affidavit is fatally defective." Judgment affirmed.)

Benninger *v.* Hess, 41 Ohio St. 64, 1884. (A and B *et al.* were in partnership. A often borrowed money for firm purposes from C. A requested C to lend the firm 1500. C complied with this request, A receiving the money. Subsequently, A gave to C a note for the amount of the loan signed by himself, A, as promisor, A endorsing the note in the firm name. C sued the firm on the note. B *et al.* contended that the note and its endorsement was without their knowledge, and that the money borrowed was not applied to the use of the firm. *Held,* affirming a judgment for the plaintiff, that the obligation of the firm to repay the loan became fixed at the moment the money was lent in good faith on the credit of the firm. Dickman, J. "And, as in the case at bar, if a partner borrows money for the use of the partnership, his declarations made at the time of the transaction, will be competent to show that the act was done in behalf of the partnership, and if the credit was obtained on the faith of such declaration, the falsity of the representation will not be material." p. 67.)

A fortiori, if a partner borrows money on the firm credit, in order to recover from the firm, it is not necessary to show that he afterwards applied the money loaned to the use of the firm.

Church *v.* Goodsell, 5 Wend. (N. Y.) 223, 1830. "Where a general partnership exists, and money is borrowed by one of the firm *in the name* of the firm, all the partners are liable, although the money when obtained be appropriated by the partner borrowing it to his own use." Marcy, J., p. 224; Whitaker *v.* Brown, 16 Wend. (N. Y.) 505, 1836. "It would not be necessary for the lender * * * to show that the partner who borrowed the money or received it for the firm, actually applied it to partnership purposes." Chancellor Walworth, p. 508; Stark *v.* Corey, 45 Ill. 431, 1867; Kleinhaus *v.* Generous, 25 Ohio St. 667, 1874.

Compare the following cases where a partner for his own purposes sells commercial paper belonging to the firm, and endorses the same in the name of the firm.

Swan *v.* Steele, 7 East, 210, 1806. (A, B and C traded as partners in the cotton business under the name of "A & B," C not being known as a partner. The firm received in the course of business a bill of exchange. A and B were in business as grocers. In this business they likewise traded as "A & B." C was not interested in the grocery business. A and B owed D for a supply of groceries. Not being able to meet the bill, A and B gave the bill of exchange which they had received in the cotton business to D endorsing the same "A & B." D was ignorant of the existence of C, and C never authorized the use of notes received in the cotton business to discharge the debts of the grocery business. *Held,* that D could recover in an action of assumpsit on the endorsement against C. *Accord:* Lewis *v.* Reilly, 1 Q. B. [1 Ad. & E. n. s.], 349, 1841.)

BOND *v.* GIBSON.

IN THE COURT OF KING'S BENCH, AT *Nisi Prius*, 1800.

1 *Campbell's Reports*, 185.

Assumpsit for goods sold and delivered. It appeared that while the defendants were carrying on the trade of harness-makers together, Jephson bought of the plaintiff a great number of *bits* to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his copartner, he immediately pawned them to raise money for his own use.

Gazelee, for the defendant Gibson, contended, that this could not be considered a partnership debt as the goods had not been bought on the partnership account, and the credit appeared to have been given to Jephson only. He allowed the case would have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants.

Lord ELLENBOROUGH. Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that *Jephson* here meant to cheat his copartner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that this individual acted for the partnership.

SECTION 3.—LIABILITY IN TORT.

MORETON *v.* HARDERN.

IN THE COURT OF KING'S BENCH, 1825.

4 *Barnewall and Cresswell's Reports,* 223.

Case. The first count alleged that the plaintiff on, &c., was passing along a public highway, at, &c., and that defendants were then and there possessed of a coach and certain horses drawing the same, which were under the care and management "of a certain then servant of the defendants," who was driving the same. Nevertheless, the said defendants, by their said servant, so carelessly and negligently drove the coach and horses, that the wheels ran with great force against the plaintiff, whereby one of his legs was broken, &c. The second count stated that the coach was under the "care and management of the defendants." Plea, general issue. At the trial before *Warren* C. J., of *Chester,* at the last Summer assizes for that place, it appeared that the defendants were proprietors of a stage-coach travelling from *Congleton* to *Manchester.* The plaintiff, at the time when the accident happened, was driving a cart along the high road. The coach was driven by the defendant, *Hardern,* and the coachman employed by the proprietors to drive was sitting by his side. The coach ran against the defendant, and thereby caused the injury stated in the declaration. It did not appear that *Hardern* saw the plaintiff at that time. For the defendants it was objected, that the first count was not proved, inasmuch as the coach was driven by one of the defendants, and not by their servant; and that the second count could not be sustained, for that the injury being immediate, and occasioned directly by the act of one of the defendants, the ac-

tion should have been trespass and not case. The learned Judge reserved these points, and left the case to the jury, who found a verdict for the plaintiff, damages 200*l.*, and that the accident was occasioned by the negligence of the defendant, *Hardern*. A nonsuit was thereupon entered, and the plaintiff had leave to move to enter a verdict in his favor for 200*l.* A rule nisi for that purpose was obtained in *Michaelmas* term.[1]

HOLROYD, J.: I think that the non-suit in this case cannot be supported. * * * The real ground of action is the negligence of *Hardern*. It is brought against all the proprietors. They are all responsible for the person appointed to drive, whether the person be or be not one of themselves. They are answerable as the owners of the coach and horses. Trespass might lie against the driver by reason of his doing the particular act; but still there would be a ground of action against his co-proprietors, and that could only be an action on the case, for they are not by his act made co-trespassers. If case lies against them, it lies against him also as a joint proprietor, if a ground of action remains after the trespass has been waived.[2]

Rule absolute.[3]

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[1] The arguments of counsel are omitted.

[2] The opinions of Bailey, J. and Littledale, J. are omitted. All three judges agreed.

[3] *Accord:* Champion *v.* Bostwick, 18 Wend. 175, 1837; Steel *v.* Lester, L. R. 3, C. P. D. 121, 1877, especially language of Lindley, J., p. 128; McCarragher *v.* Gaskell, 42 Hun (N. Y.), 451, 1886, p. 453.

NISBET *v.* PATTON.

IN THE SUPREME COURT OF PENNSYLVANIA, 1833.

4 Rawle's Pennsylvania Reports, 120.

On the return of a writ of error to the District Court, for the City and County of Philadelphia, it appeared that this was an action of trover, brought by *James Patton* and others, assignees of *Henry Simpson,* against *Michael Nisbet* and *David C. Wood,* trading under the firm of *Michael Nisbet & Company,* for the conversion of six promissory notes, drawn by different persons, in favour of *Henry Simpson.*

Simpson, who was a dealer in dry goods, had been in the habit of depositing goods with the defendants below, who advanced their notes upon them. The notes for the conversion of which this suit was brought, had been placed in the hands of the defendants below, with an understanding, that when goods were deposited with them, the notes were to be returned. On the day of *Simpson's* failure, which took place on the 12th *January,* 1826, he deposited a quantity of goods with the defendants, and on the following day he executed to the plaintiffs below an assignment for the benefit of his creditors. On the same day his assignees sent to demand the notes. *Nisbet,* on whom the demand was made, said he would deliver the notes, but could not get them then, as they were locked up in his fire proof, and his book-keeper was gone home with the key, but promised on the honour of a gentleman, to give them up in the morning. On being called on again on the following morning, he said that he would not give them up, or that he had not them. The demand was made on *Nisbet* alone, *Wood* not being present.

On the part of the defendants below, it appeared, that *Michael Nisbet,* a short time previous to the formation of

the partnership of *Michael Nisbet & Co.,* of which *David C. Wood* was a partner, had been a partner in another firm, trading under the firm of *Cohen and Nisbet;* that by the terms agreed upon at the dissolution of the latter firm, he was authorised to settle its affairs, and that *Simpson* was indebted to the firm of *Cohen and Nisbet,* to a larger amount than that which was claimed by the plaintiffs in this cause. *Nisbet,* therefore, claimed a right to retain the notes in controversy, alleging that he had a lien upon them for the debt due by *Simpson* to the firm of *Cohen & Nisbet.*

The defendant then produced and gave in evidence a promissory note, dated the 2nd of *August,* 1825, at six months, for five hundred and twenty-five dollars and seventeen cents, drawn by *Henry Simpson* in favour of *Cohen & Nisbet;* another note dated the 11th of *August,* 1825, at six months, for four hundred and three dollars and twenty cents, also drawn by *Henry Simpson* in favour of *Cohen & Nisbet,* and a third note dated *August* 13th, 1825, at six months, for four hundred and forty-five dollars and twenty cents, drawn by *Henry Simpson* in favour of *Cohen & Nisbet.* They also gave in evidence a copy of an account current, dated 13th *March,* 1826, rendered by *Michael Nisbet & Co.* to the assignees of *Henry Simpson,* showing a balance of two hundred and fifty-three dollars and fifty-eight cents, due to the assignees, and a receipt for that sum dated the 14th of *March,* 1826.

The counsel of *David C. Wood,* requested the judge who tried the cause in the court below, to charge the jury, "That if they believed from the evidence that *Nisbet* detained the notes in controversy on behalf of *Cohen & Nisbet,* and not on behalf of *Michael Nisbet & Co.,* then *David C. Wood* is not liable, and the jury ought not to find a verdict against him."

The counsel for the plaintiffs below, requested the judge to charge the jury as follows:

"1. That if the promissory notes for which this ac-

tion is brought, were placed in the hands of the defendants as a temporary security for moneys advanced to *Henry Simpson,* until a security in goods should be delivered, and that security was afterwards deposited, the defendants had no lien upon the notes against *Simpson* or his assignees as a security for any claim of another firm of which the defendants, or one of them, were or was a member.

"2. That if the notes in question were so delivered to the defendants for a specific purpose, after that purpose was complied with, the defendants are answerable in this action after demand and refusal by the plaintiffs, and it is of no consequence to the validity of the plaintiffs' claim against the defendants, that one of them alone retained the notes for a purpose in which he alone was interested."

The judge instructed the jury as he was requested by the counsel for the plaintiffs, and added, that the action being trover, the doctrine of set-off did not apply; but had the action been one of contract, as the notes were not due when the suit was brought, set-off could not be permitted: That there being no defence either by way of lien or set-off, and the defendants being copartners in business, and having as such received the notes for a particular purpose, whenever that purpose was complied with, they were bound to surrender the notes; and the circumstance of *Wood's* not taking an active part in the business, and not having been present when the demand was made on *Nisbet,* and *Nisbet's* retaining the notes for the debt of *Cohen & Nisbet,* did not absolve *Wood* from liability in this action.

With respect to the point propounded by the counsel of *Wood,* his HONOUR said, that he was unable to instruct the jury as he was requested. The law was not so, but just the contrary. The defendants being partners, and the notes in question having been delivered to *Michael Nisbet* for purposes connected with the business of the partnership, the conversion of one, was, in point of law, the conversion of both.

The jury found a verdict for the plaintiffs, and the defendants sued out a writ of error.

Stroud, for the plaintiffs in error, cited *Vasse* v. *Smith,* 6 *Cranch,* 226. 2 *Phill. Ev.* 125. *White* v. *Demary,* 2 *New Hamp. Rep.* 546. *Bull. N. P.* 44. 2 *Saund. on Pl. and Ev.* 478. *Collier on Part.* 253.

Rawle, Junr. contra, referred to *Gow on Partnership,* 52, 79, 174, 175. *Durrell* v. *Mosher,* 8 *Johns. Rep.* 347. 1 *Maule & Selw.* 388.

The opinion of the court was delivered by

Gibson, C. J.—The case of *White* v. *Demary,* 2 *N. H. Rep.* 546, though apparently in point, depended on a principle entirely distinct from that which governs the transactions of partners. There the defendants were but joint baillees; and the law is settled that the act of a tenant in common shall not prejudice the title of his co-tenant, or charge him with a tort. It is otherwise with partners, each of whom constitutes the other a general agent of the firm with power to bind it, not only by his contracts, but by his acts in the scope of the business. His authority to contract has never been disputed; and the responsibility of the firm for the legal consequences of his acts, stands on a principle equally settled. Thus, in *Willett* v. *Chambers, Cowp.* 814, an attorney whose partner had received money to be laid out on a mortgage, was held liable for it though the mortgage was forged by the receiving partner without the knowledge of the other. The same principle was held in the *Manufacturers and Mechanics Bank* v. *Gore,* 15 *Mass. Rep.* 75, and *Boardman* v. *Gore, Id.* 331; and it has been decided in *Biggs* v. *Lawrence,* 3 *T. R.* 454, that a trading on joint account in contraband goods, will implicate an innocent partner. So in *Hadfield* v. *Jameson, 2 Munf.* 65, it was determined that the fraud and misconduct of one part owner which produced the loss of a ship and cargo, affected the claim of both to freight under a charter party. It is, however, conceded that both would have been an-

swerable here for the act of *Nisbet* in an action on the contract to redeliver the notes after the purposes of the deposit were satisfied; and this concession includes the decisive fact, that the refusal of *Nisbet* was the refusal of his co-partner. Being so for any purpose, it must be so for every purpose; for it is not easy to see why it should be his act to charge him on a contract, and not his act to charge him with a tort. It is not doubted that partners may be sued in trover where they join in the conversion; and do they not join where the act of one is the act of all?

It can be but of little account to them whether they are made to respond in the one sort of action or the other; for though it be true that there is no contribution between tort feasors, it is equally true that a partner may be made answerable to the firm for misconduct in involving it in responsibility. It is said indeed that trover to recover damages for a destruction of the joint property, is the only action founded in tort that can be maintained between partners. That would seem, however, to have been asserted without sufficient consideration; for it is not easy to see why a partner should not be answerable to the firm, as in any other case of principal and agent, for gross and wilful misfeasance. In *Hadfield* v. *Jameson,* it was taken for granted, that the delinquent partner was liable to the other for the loss of the ship; but certainly not in trover, for his acts were evidence of anything but conversion. The act then of *Nisbet,* being *prima facie* the act of his partner, was evidence of a joint conversion, subject however to be rebutted by proof, if such there were, that the latter had openly disclaimed the act at the time; and the direction was in all respects essentially right.

Judgment affirmed.[1]

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[1] *See:* Kuhn *v.* Weil, 73 Mo. 213, 1880. (A and B were partners. A without the knowledge or consent of B began a suit in the name of the firm against C for a partnership debt, and attached the goods of D. *Held,* that B was liable to D for the wrongful seizure, as a

result of the partnership relation between A and B. *Accord:* Vanderburgh *v.* Bassett, 4 Minn. 242, 860; Cunningham *v.* Woodbridge, 76 Ga., 302, 1886; Lockwood *v.* Bartlett, 7 N. Y. Supp. 481, 1889; Hobbs *v.* Chicago Packing Company, 98 Ga. 576, 1896. *But see:* Chambers *v.* Clearwater, 1 Keyes (N. Y.) 310, 1864. (A statute provided that "no Judge of any court can sit as such in any case in which he * * * would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." B was a justice of the peace and a cousin of C. C and D were partners. E mortgaged his horses and wagon to A to secure a debt, A having the right to take possession. He did not exercise this right. C and D recovered a judgment against E before B, and the horses and wagon were seized on the execution. C and D were active in bringing the suit, but C alone directed the execution. A brought an action in the nature of trover against C and D.) *Held*, that the above recited statute made the execution void, and the judgment for the plaintiff should be affirmed. Note, however, the reasons for holding D liable given by Denio, Ch. J.

"The defendants were both active in obtaining the judgment against Roosa, and although Clearwater alone gave the directions for seizing the horses and wagon, he should be presumed, in the absence of evidence to the contrary, to have been acting in conjunction with the other defendant in a common enterprise of collecting their joint debt by a seizure of the property in question. Although the commission of a trespass was not within the scope of the partnership enterprise, the collection of the joint debt was a part of that business. The direction to levy the execution upon a particular subject was an incident to the obtaining payment of the debt by legal process, and when one of the partners was found acting in that undertaking, the presumption is that he had the countenance and assent of the other partner."

HAWKINS *v.* APPLEBY.

IN THE SUPERIOR COURT OF NEW YORK, 1849.

2 Sandford's New York Superior Court Reports, 421.

This was an action of trespass on the case. The declaration set forth that, in the month of March, 1847, the defendants applied to the plaintiffs to purchase from them a quantity of tobacco, and offered in payment a promissory note of Barstow Emanuel & Co., dated New York, January 15, 1847, for the sum of $274.80, payable in six months; that the defendants represented the note to be good, and the makers in good credit, and that the plaintiffs relying upon the representations so made, sold and delivered to the defendants a quantity of tobacco, and took the note in payment. In the second count of their declaration, the plaintiffs averred that the defendants represented the note to be a good note, and that *"it would pass in Southstreet."* The declaration further alleged that, Barstow Emanuel & Co., at the time of the transfer of the note to the plaintiffs, were wholly insolvent, and that the defendants, knowing such to be the fact, fraudulently made the purchase as set forth. The defendants pleaded the general issue.

A verdict was taken in favor of the plaintiffs for $289.94, subject to the opinion of the court, on a case to be made, and subject to such modification or adjustment of the verdict as the court might deem proper, with leave to the defendants to move for a nonsuit.[1]

E. W. Stoughton, for the defendants.

III. There is no proof that Moore knew of, or sanctioned, the representation alleged to have been made by Appleby; nor was he really interested in the note: this was

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[1] The statement of facts as given by the Reporter is abbreviated.

known to Hawkins. A fraudulent representation by one partner, will not bind or affect the other, in this action. (*Pierce* v. *Jackson,* 6 Miss. R. 242; *Sherwood* v. *Marwick,* 5 Greenleaf R. 295.)

If the suit was directly upon the contract of warranty made by one of the partners, the rule would be otherwise. So also, the plaintiffs could have brought trover or replevin for the tobacco, at least after demand made therefor; as, in such case, retaining possession would be deemed the fraud of both defendants.[2]

SANDFORD, J.: The other alleged variance depends upon the principal question in the cause, the liability of Moore in respect of the fraud of his partner Appleby.

It has long been established, that a partner is liable in assumpsit for the consequences of frauds practised by his copartner, in the transaction of their business, of which he was entirely ignorant, and although he derived no benefit from the fraud. (Collyer on Part. 240; Story on Part. § 108.) This is upon the ground, that by forming the connexion, partners publish to the world their confidence in each other's integrity and good faith, and impliedly agree to be responsible for what they shall respectively do within the scope of their partnership business; and if by the wrongful act of one, a loss must fall upon a stranger, or upon the other partner who is equally innocent, the latter having been the cause or occasion of the confidence reposed in his delinquent associate, must suffer the loss.

Several striking applications of this principle, are to be found among the adjudged cases; of which we will refer to *Rapp* v. *Latham,* 1 Barn. & Ald. 795; *Stone* v. *Marsh,* 6 B. & Cr. 551; *Hume* v. *Bolland,* Ryan & M. 371; and *Boardman* v. *Gore,* 15 Mass. 331.)

It is perfectly clear, that if the plaintiffs had wholly

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[2] Only so much of the Reporter's notes of the arguments of counsel, and the opinion of the Court as relates to this question is reprinted.

disaffirmed the sale, and sued Appleby and Moore in assumpsit for the price of the tobacco, they would have been entitled to recover. Is the rule different in an action to recover damages for the deceit practiced upon them? The difference in theory is, that in assumpsit the innocent partner is charged with the purchase of goods; while in the action of tort, he is accused of a fraud of which he personally is innocent. In practical effect, the only difference is, that in the one case the plaintiff alleges a sale and proves a fraud; in the other, he both alleges and proves the fraudulent transaction. In both forms of action, the innocent partner is subjected to liability, on the principle that he has held out his associate to be worthy of confidence, in their copartnership dealings. The difference in the ulterior remedy, after judgment, cannot have any effect upon the propriety of the form of action.[3]

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[3] *Compare:* Townsend *v.* Bogart, 11 Abb. Pr. (N. Y.) 355, 1860. (Under the Code, where debts are sued on civilly, the plaintiff could begin by an arrest "when the defendant has been guilty of fraud." A and B were partners. A, without the knowledge of B, by fraud induced C to sell goods to the partnership. C brought an action on the case for the deceit against A and B. *Held,* that before the code B was liable for the deceit, and that after the code B could be proceeded against by arrest.)

Stewart *v.* Levy, 36 Cal. 159, 1868. (A and B were partners. A by fraudulent representations induced C to sell certain goods to the partnership. C sued A and B for damages on account of the fraud, obtained a judgment, and the Court ordered execution to issue against the bodies of the defendants. In the course of the trial B asked the Court to charge that, "If the jury shall find from the evidence that the fraud, if any, was committed by the defendant [A] and not by the defendant [B] they must acquit the defendant [B] of the charge of fraud," p. 165. The Court refused to so charge. *Held* error, on the ground that, because though, "All the partners will be bound by the fraud of one of the partners in contracts relating to the partnership," and, "all are responsible for the injury occasioned by the fraud, and are liable to an action brought on the contract, or for the recovery of property fraudulently obtained," they are not liable in this case because "the fraud upon which the judgment proceeds is actual, intentional fraud, and implies moral turpitude." pp. 165, 166).

Cooper *v.* Prichard, 48 Law Times 848, 1883. (A and B were partners in the business of solicitors, and it was part of the business of the firm to receive money for investment. A, acting for the firm, received money from C to invest and misappropriated it. B was not a party to the fraud. A and B became bankrupts and received their discharge. C sued B for the money lost through A's act. B pleaded his discharge. Judgment for C. Appeal. The English Bank-

It is laid down in a respectable treatise on the subject of parties to actions at law, that where one takes property for the use of another, the latter may adopt the act; and he is thereby placed in the situation of one who had previously commanded the taking, and becomes a trespasser if the act were unlawful. (Hammond on Part. 84.) Now in this case, Appleby obtained the tobacco for the use of himself and Moore. Moore adopted the act by receiving and participating in the use of the property. He was thus placed in the same situation, in reference to the rights of the plaintiffs, as if he had directed Appleby to procure the property, or had concurred with him in the transaction; and on the authority cited, he became a wrong doer. There is the additional circumstances in this case, that the plaintiffs immediately on discovering the fraud, and within a fortnight after the exchange, notified the defendants in writing, that they had ascertained the note to be bad, and that they should hold the defendants liable for the tobacco.

The omission of Moore to repudiate or disaffirm, on this occasion, what his partner had done, must be regarded as a distinct adoption and ratification of the act; and we think he ought to be deemed from thenceforth a joint wrong doer with Appleby.[4]

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ruptcy Act, of 1869, provided that "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust." Brett, M. R., with whom concurred Lindley, and Fry, L. JJ., believed that had the Act read "incurred by means of *his* fraud" B could have pleaded his discharge. Our Bankruptcy Act of 1898 provides, Section 17, that a discharge shall release a bankrupt from all his proveable debts except such as (2) "are *liabilites* for obtaining property by false pretences or false representations;" or, (4) "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.")

[4] *On the question of the ratification of torts by copartners see:*
United States *v.* Baxter, 46 Fed. 350, 1891. (A and B were partners in the lumber business. They trespassed on lands of the United States, cutting timber. The United States brought an action for damages. If the trespass was wilful, punitive damages could be recovered. B pleaded that he was ignorant of the fact that he was committing a trespass, though in the case of A the trespass was wilful. *Held*, that though B might have been ignorant at the time, by retaining the fruits of the wrongful act after being notified of its character he made himself liable as if the act of cutting had been a wilful tort.)

GILBERT *v.* EMMONS.

In the Supreme Court of Illinois, 1866.

42 Illinois Reports, 143.

This was an action of trespass on the case, brought in the court below by Strew M. Emmons against Frank S. Palmer and William Gilbert, for malicious prosecution of the plaintiff, upon a charge of larceny.

A trial resulted in a verdict for the plaintiff for $5,000 damages; Palmer having died after the verdict was rendered, a judgment was entered against Gilbert, from which he took this appeal. So much of the pleadings and facts in the case as are necessary for an understanding of the questions decided, will be found in the opinion of the court.

Lawrence, J.: Judgment must be reversed on account of the error in giving the sixth instruction for the plaintiff, which was as follows:

"If the jury believe, from the evidence, that the defendants, or either of them, with the knowledge and consent of the other, caused a warrant to be sued out for larceny against the plaintiff, and thereby occasioned the arrest and imprisonment of the plaintiff; and if the jury further believe, from the evidence, that said warrant was maliciously obtained by the said defendants, or either of them, with the knowledge and consent of the other, and without probable cause, then the plaintiff is entitled to recover damages, and the jury may allow the plaintiff such damages as, from the evidence, they believe to be just and right under all the circumstances of the case, not exceeding the damages laid in the declaration."

The defendants in this case were partners, and the money said to have been stolen seems to have been the money of the firm. But Gilbert, the plaintiff in error, had

no personal knowledge of the circumstances under which the money was taken, nor does it appear that he had any direct personal agency in causing the arrest. The affidavit upon which the warrant was issued was made by Palmer, and he directed the officer in its execution. The declaration avers that he acted "with the advice and consent and at the instigation of the defendant, Gilbert." Although Gilbert may not have directly caused the arrest, yet, if he advised it, as averred in the declaration, he would be equally responsible with Palmer. And that he did so advise need not be directly proven. The jury would have the right to infer it, if circumstances were proven justifying such an inference. Whether such facts were proven, is a question upon which we express no opinion, as the case must go before another jury. But that Gilbert is not liable unless he either directly participated in causing the arrest, or advised it to be made, is clear. The mere "knowledge and consent," on his part, that Palmer should have the arrest made, would not, as stated in the instruction, make him liable. Such an act, even if done with his knowledge and consent, was not within the scope of their partnership. A mere passive assent on his part, that Palmer might take such steps as he thought proper for the recovery of the money, or for the punishment of the person supposed to have taken it, would not render him liable. This would be merely a consent that Palmer might incur such personal liabilities as, from his knowledge of the facts, he should think just and expedient.

But one person cannot be made liable in damages because he knows that another person is about to commit an unlawful act, even though he fails to protest against it, and, therefore, in the ordinary use of language, may be said to have consented to it. In this sense a jury would probably understand this instruction. But something further would be necessary in order to make Gilbert liable. It would be necessary that his "consent" should be of so active and positive a character as to amount to advice and

co-operation. In many cases the use of one of these words in place of the other, might not mislead a jury, but, in the record before us, the merits of the controversy turn to a large extent upon the difference between these terms. Did he merely leave Palmer free to follow the dictates of his own judgment, without interference on his part, which would be a species of consent, but not such as to make Gilbert liable? or did he advise and encourage the arrest, as averred in the declaration, and thus jointly with Palmer assume its liabilities? On another trial, this instruction should be modified. The judgment is reversed and the cause remanded.[1]

Judgment reversed.[2]

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[1] The parts of the opinion which relate to matters not raised by the sixth instruction are omitted.

Accord: Marks *v.* Hastings, 101 Ala. 165, 1892; Kirk *v.* Garrett, 84 Md. 383, 1896; Martin *v.* Simkins, 116 Ga. 254, 1902. See also the earlier case in the House of Lords, on appeal from the Scottish Courts, Arbuckle *v.* Taylor, 3 Dow, 160, 1815.

BREWING *v.* BERRYMAN.

IN THE SUPREME COURT OF NEW BRUNSWICK, 1875.

15 *New Brunswick* (*2 Pugsley's*) *Reports*, 515.

Trespass on the case. In Nov. 1868, Elisha Broad having the equity of redemption in the building in which plaintiff's rooms were, and being in possession verbally agreed with the plaintiff to let him have two rooms and also the use of steam power to drive certain machinery, of the plaintiff, who was engaged in the business of sash and blind maker, for a term of three years from the 1st of May following, at a rent of £60 per annum. Under this agreement the plaintiff, who was then in the premises, continued in possession after the 1st of May. Subsequent to the agreement, on the 18th January, 1869, Broad being indebted to one Wm. Peters, who at the time of the agreement was mortgagee of the premises, made to him an absolute conveyance of all his right, title and interest in the property. On the 9th August, 1871, Peters conveyed to the defendants, who also took a quit-claim deed from Broad. The defendants, all of whom had separate businesses of their own, were engaged, along with one Levi H. Young, as co-partners in the manufacture of bolts and screws, which they carried on in the factory in which were the rooms leased to plaintiff, under the name of "The New Brunswick Bolt Works Company." In August 1871, after the defendants had become the owners of the factory, Young, and the foreman of the company, entered upon the portion of the premises occupied by the plaintiff, and without his permission, tore down a chimney, in consequence of which, injury was done to lumber, blinds and other property of the plaintiff. * * *

It was shewn that the chimney was torn down by

Young for the purpose of effecting improvements on the defendants' property for the purposes of the Bolt Works, and also that the bricks were appropriated and used by the company, though the defendant, John Berryman, had no personal knowledge of this fact. It was also shewn that he had never personally interfered in the management of the company's business. Campbell G. Berryman also said he gave no authority to Young to tear down the chimney, particularly in the manner he did, which was admitted to have been quite unjustifiable. His Honor directed the jury that they might take into consideration the circumstances under which the act was done, and could, if they thought proper to do so, give exemplary damages.

The Jury gave the plaintiff $750 damages, which was very much beyond the actual injury done.

Rule *Nisi* for a new trial granted.[1]

RITCHIE, C. J. One question raised in this case is, whether the defendant, John Berryman, can be liable for the amount of damages found—he not having personally taken any part in the wrongful act committed by the other defendant. But does any such question really arise here as to the proper measure of damages, where one co-trespasser has acted from improper motives, in which the other has not participated, or as to how the damages ought to be assessed in reference to the acts and motives of the most guilty, or the most innocent party? It being assumed, as it must now be, that the defendants were both liable for the act complained of, viz., the pulling down the plaintiff's chimney, and the injury to his property, they must both necessarily be liable for the manner in which it was done. There were no distinct or unconnected acts of one or other of the defendants, to make one or other more culpable, so far as the plaintiff was concerned. What he complains of is, that being in the lawful and quiet occupation of his

[1] The Reporter's statement of the facts is abbreviated and his notes of the arguments of counsel are omitted.

tenement, and in the peaceable prosecution of his business, his property was invaded, and his business interfered with, and, as he alleges, destroyed. The wrong thus complained of was found to be the joint and several tort of both the defendants, done by one for their joint benefit, and in which benefit both clearly participated. Is there anything in the case that would justify the jury in discriminating (if they had the right to do so,) between the liability of the defendants? If the plaintiff is entitled to recover for the wrong, why should not the full amount he is entitled to be borne equally by both defendants?

This case is widely different from that of two co-trespassers, each making himself liable by his own acts and conduct. Here the defendant, John Berryman, is liable, not because he individually and personally did any tortious acts, but because the law holds him responsible for the wrongful acts of his co-partner, the other defendant, in a matter connected with the partnership business: in other words, he committed the tort by his servant, agent and partner, and therefore is equally liable with the person for whose acts the law thus holds him responsible; and therefore, in this case, the plaintiff is entitled to recover from both defendants the damages for the whole injury he has sustained from the joint act of trespass.[2]

Rule discharged.

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[2] The Court's discussion of the alleged excessive nature of the damages given, admitting that exemplary damages could be recovered against Berryman, is omitted.

[3] *Compare:* Grund *v.* Van Vleck, 69 Ill. 478, 1873. (B and C were apparently real estate agents. They rented the property in Chicago, of D, a resident of New York, to A. While C was in the East, B, without the knowledge of either C or D, claiming that A was in default in payment of rent, caused E to make a distress, and afterwards evicted A. A brought an action of trespass against B, C, and D. *Held,* that there was no evidence to justify a verdict against C or D. As to C the Court said: "One partner has no right to involve another, unless in the ordinary course of their business; nor, for instance, in a trespass, except in a case where the trespass is in the nature of a taking which is available to the partnership, and in such case, to render one partner liable who did not join in the commission of the trespass he must afterwards have concurred

in and received the benefit of it." Citing Petrie *v.* Lamont, 1 Car. & M. 93, 1841. In that case Tindall, C. J., said, p. 96, that the other partners would be liable if the trespass "is in the nature of a taking, which is available to the partnership, *more especially* [Italics ours] if the other partners afterwards agree and consent to it.")

Titcomb *v.* Lydia, 57 Ill. App. 296, 1894. (B and C were partners. They had a chattel mortgage on certain property of A. A, being in default, B and C had a right to take possession of the goods provided they could do so peacefully. B, without the knowledge of C, took the goods by violence, assaulting A. A sued B and C in trespass. *Held,* that C was not liable.)

McILROY *v.* ADAMS.

In the Supreme Court of Arkansas, 1877.

32 Arkansas Reports, 315.

Harrison, J.: This was an action by Adams & Bro., against Denton D. Stark and William McIlroy, for the malicious prosecution, without probable cause, of an action against them.

The averments of the complaint were: That the plaintiffs, on the 8th of September, 1873, executed to J. C. Pendleton, a note for $1032, payable ninety days thereafter, and that Pendleton, indorsed the note in blank, and the same was before maturity delivered to the defendants, who were partners and bankers under the firm name of D. D. Stark & Co., in Fayetteville, for collection. Pendleton not parting with his interest, and remaining the owner thereof.

That the defendants after the note fell due, falsely and fraudulently represented, that they were the owners of the note, and had purchased the same for a valuable consideration before maturity, and brought suit thereon in their own names against the plaintiffs in the Washington Circuit Court, and recovered judgment by default; that the plaintiffs had a good and valid defense against the note, which the defendants knew when they brought their suit, but the plaintiffs were deceived by the representations of the defendants, and supposed that they were the owners of the note and had acquired it by purchase before its maturity, and did not know any better until after the judgment had been obtained: That the defendants sued out execution on the judgment, and the same was by their direction levied in the plaintiffs' stock of drugs and medicines, they being druggists, which were seized and taken

and their store closed; and that their stock of drugs and medicines were detained from them five months, and they were dispossessed of their store thirty days:

That after the levy of the execution the plaintiffs filed their complaint in equity in said court against the defendants, for an injunction against the judgment, and upon the hearing of the cause, it was by the decree of the court perpetually enjoined.

And that whilst the said goods were in the custody of the sheriff they were damaged and reduced in value $1000, and by the seizure of their stock, and the closing of their store, their credit was ruined and their business destroyed, and they thereby sustained damage to the amount of $4000.

* * *

A trial was had as to McIlroy.

The appellant read to the jury the articles of partnership between himself and Stark, by which it was agreed, that they should form a partnership by the firm name of Denton D. Stark & Co., "in the buying and selling of exchange, gold, silver, bonds and whatsoever to the said business belongs," to which Stark was to give his entire attention; and he testified that the partnership was strictly confined to the business of banking, and it had no authority from him to engage in anything which did not appertain to that; that he had nothing whatever to do with the management or control of the business, and the same was attended to and conducted solely by Stark. That the purchase of notes was no part of the business of the firm, and if Stark claimed the note as the property of the firm, it was without authority from him; that he had no knowledge of the note, nor of the suit and the proceedings to collect the note during their pendency, and they were unauthorized by him.

He asked, with others, the following instructions which the court refused to give, viz.:

Fourth—The obtaining of money, or the attempt to obtain money by fraud for the use of a firm, does not render the partners liable as such, without their participation in or consent to the fraud.

Twelfth—Unless McIlroy individually participated in falsely and fraudulently procuring the judgment against the plaintiffs, and causing the alleged wrongs to be committed, the verdict should be for him.

Fifteenth—The plaintiff cannot recover against McIlroy, unless it be proven that the defendants fraudulently prosecuted the action to judgment, knowing that they had no right to recover, and that McIlroy personally had such knowledge. [The instructions were refused, and a verdict was returned for the plaintiff for $650.]

The instructions were properly refused.[1] "Partners are liable *in solido* for the tort of one, if that tort were committed by him as a partner, and in the course of the partnership." Par. Part., 150. And Judge Story says: "It has been well remarked by a learned writer that 'although the general rule of law is that no one is liable upon any contract, except such as are privy to it yet this is not contravened, by the liability of partners, as they may be imagined virtually present at, and sanctioning the proceedings they singly enter into in the course of trade; or as each vested with a power enabling them to act at once as principals and as the authorized agent of their copartners.'" "The principle," he says, "extends further, so as to bind the firm for the frauds committed by one partner in the course of the transaction and business of the partnership, even when the other partners have not the slightest connection with, or knowledge of, or participation in the fraud; for, as has been justly observed, by forming the connection of partnership the partners declare themselves to the world satisfied with the good faith and integrity of each other, and implicitly

[1] Only so much of the opinion as relates to this question is reprinted.

undertake to be responsible for what they shall respectively do within the scope of the partnership concerns." Sto. Part., sec. 104, 108.

The Judgment is affirmed.[2]

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[2] *Accord:* Swenson *v.* Erickson, 90 Ill. App. 358, 1899. (C owed the firm of A and B. B, without the knowledge or approval of A, went before a justice of the peace and accused C of fraudulently concealing her property. On B's affidavit, under the statute relating to the bringing of civil actions by attachment in the case of fraudulent debtorts, C's goods were attached and taken away. There was no foundation for the fraud charged, and the prosecution of the case was dropped. C sued A and B for malicious prosecution. *Held,* that she could not recover against A. Adams, J.: "In the present case it was incumbent on defendant in error to prove both want of probable cause for suing out the writ of attachment and malice. Now, while it is true that malice may be inferred from want of probable cause, as against the person who acted in the premises without probable cause, it would be extremely unreasonable and unjust to indulge in such inference against one who neither advised nor co-operated in, nor ratified, nor derived benefit from the act done without probable cause.")

ROSENKRANS *v.* BARKER.

IN THE SUPREME COURT OF ILLINOIS, 1885.

115 *Illinois Reports*, 331.

Mr. Justice Craig delivered the opinion of the Court:[1]

This was an action brought by A. E. Barker, in the Superior Court of Cook county, against O. L. Rosenkrans and J. H. Weber, to recover damages for an alleged malicious prosecution and false imprisonment. A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff for $2000. The defendants appealed to the Appellate Court, where the judgment was affirmed.

The facts out of which this litigation grew, so far as is necessary to state them, are substantially as follows: In 1882 Barker resided in Iowa, and was engaged, in a small way, in the jewelry business. In the latter part of the year he bought a bill of goods of Rosenkrans & Weber, of Chicago, amounting to $350. The goods were sold by a traveling man named Johnson. When the bill became due, $100 was paid, but no part of the balance has ever been paid. Rosenkrans resided in Wisconsin, and did business in Milwaukee, but at the same time he was a partner in the jewelry business of Rosenkrans & Weber, in Chicago, the firm being composed of Rosenkrans and Lucy B. Weber, who was the wife of J. H. Weber. J. H. Weber had the general management of the business of this Chicago firm. On or about the first of February, 1883, the bill of goods remaining unpaid, Johnson, who had sold the goods, induced Barker to visit Chicago, under the pretence that he would enter into partnership with him in the jewelry business, in Chicago. Upon the arrival of Barker, Weber

[1] The Reporter's statement of the facts of the case, and his note of the argument of the counsel for the appellee are omitted.

was notified, by Johnson, of the arrival, and on the 5th day of February, 1883, Weber filed a petition and obtained an order for a writ of *ne exeat*. The writ was issued, and placed in the hands of the sheriff, who arrested Barker, and held him in custody ten or twelve hours, when he was released on bail. Subsequently, and on the 17th day of March, 1883, on demurrer, the petition was dismissed. It does not appear that Rosenkrans had any knowledge that the proceedings had been instituted against Barker, until about the first day of April, 1883, and at this time the petition for a *ne exeat* had been held bad on demurrer, and dismissed, and Weber had then, or few days thereafter, appealed to the Appellate Court. When Rosenkrans learned what had been done, he notified Weber that it was wrong, and advised the dismissal of the appeal from the Appellate Court, and under his advice no further steps were taken to prosecute the appeal. * * *

It is, however, claimed by appellee, that Rosenkrans is liable upon either one of two grounds: First, because those who caused the arrest were servants or agents of Rosenkrans, acting within the scope of their agency. * * *[2]. Weber, who caused the arrest of Barker, was not, in fact, a partner of Rosenkrans, but he acted for his wife, who was the partner, and so far as the acts are concerned, they may be regarded as the acts of Rosenkrans' partner. In many respects one partner is the agent of the other. In the purchase and sale of goods within the scope of the partnership business, the acts of one may be regarded as the acts of both. In such cases the one that transacts the business, acts for himself and in the capacity as agent of the other, and in that capacity he binds himself and also binds his partner. By entering into partnership, each party reposes confidence in the other, and constitutes him his general agent as to all partnership concerns. (Gow on

[2] Only that part of the opinion which relates to the "first ground" is reprinted.

Partnership, 52.) But the question involved here is not as to the liability of one partner for the contracts of the other, but it is whether one partner may be liable in damages for the wrongs of the other. Mr. Collyer, in his work on Partnership, section 457, says: "A learned writer observes, that though partners are, in general, bound by the contracts, they are not answerable for the wrongs of each other. In general, acts or omissions in the course of the partnership trade or business, in violation of law, will only implicate those who are guilty of them." And in 1 Lindley on Partnership, bk. 2, chap. 1, sec. 4, the author says: "As a rule, however, the willful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable unless all the members are, in fact, privy to the malicious prosecution." In *Gilbert* v. *Emmons,* 42 Ill. 143, where a question arose as to the liability of one partner for the act of the other in causing the arrest of a person charged with larceny of money belonging to the firm, it was held that the mere knowledge and consent of one partner that the other should have the person accused arrested, would not render the partner so knowing and consenting, liable to an action for malicious prosecution. It was necessary that the consent should be of such a character as to amount to advice and coöperation. In *Grund* v. *Van Vleck,* 69 Ill. 478, a question arose as to the liability of one partner for the tort of the other, and it was held that one partner can not involve another in a trespass unless in the ordinary course of their business, and in a case where the trespass is in the nature of a taking which is available to the partnership; and in such case, to render the partner liable who did not join in the commission of the trespass, he must afterwards have concurred, and received the benefit of it. Here no part of the debt was collected by the commencement or prosecution of the proceedings against Barker, and it is not claimed

that a liability exists on account of receiving any benefit from the arrest, and if Rosenkrans is to be held liable, it is upon the ground that he was a member of the firm which instituted the suit and caused the arrest. This, under the authorities cited, can not be done.

Judgment reversed.

LOTHROP *v.* ADAMS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1882.

133 *Massachusetts Reports*, 471.

Tort, in seven counts, against the proprietors of a newspaper, called the Springfield Republican, for publishing in said paper, at different times, false and malicious libels of and concerning the plaintiff, a minister, in respect to his treatment of his family.

The defendants asked the judge to rule, that express malice of one of the defendants could not affect the other defendants, unless it appeared that they participated in such malice; and if the jury should find a verdict on the ground of express malice, they could find it as to those only who were shown to be actuated by such malice. The judge refused so to rule.[1]

FIELD, J.:

In a civil action for a libel, before the passing of any statute on the subject, the truth of the words published was a defence, whether they were published with or without malice; but if the words published were false, it was no defence that the person who published them believed them to be true, unless the communication was privileged. Except, then, in cases of privileged communications, it was generally true that evidence of actual malice or of the want of actual malice was immaterial to the right of action, and was admissible, if admissible at all, only for the purpose of enhancing or diminishing the damages.

The Gen. Sts. *c.* 129, § 77, provide that, "In every prosecution and in every civil action for writing or for publishing a libel, the defendant may upon the trial give

[1] Only so much of the Reporter's statement of facts and of the opinion of Judge Field as relates to this refusal of the trial judge are reprinted.

in evidence the truth of the matter contained in the publication charged as libellous; and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved." This is a reënactment of the St. of 1855, *c.* 396. For previous statutes, see Rev. Sts. *c.* 100, § 19, *c.* 133, § 6; St. 1826, *c.* 107, §1. Since the passage of the St. of 1855, *c.* 396, the truth of the words published is no longer an absolute defence; the plaintiff may, notwithstanding the words are true, maintain his action if he can show that they were published with malicious intention.

The defendants in this case were copartners, engaged in the publication of a newspaper. The court was requested by the defendants to rule "that express malice of one of the defendants could not affect the other defendants, unless it appeared that they participated in such malice; and if the jury should find a verdict on the ground of express malice, they could find it as to those only who were shown to be actuated by such malice." The court refused to give this ruling. The statute undoubtedly, by using the words "malicious intention," means an actual malicious intention, which the defendants in their request properly enough denominate "express malice." The malice which it has been said the law ordinarily implies, in actions of slander or libel, from the uttering or publishing of false defamatory words, is in one sense a fiction, invented to satisfy the forms of pleading. The words "express malice" have been used, in contra-distinction to the malice which it was said the law implies, to mean actual malice, or malice in fact, which is the same thing as malicious intention. The correctness of the ruling asked for must be determined by the rules of law applicable to civil actions, in which a specific actual intention or purpose must be shown to exist in order to maintain the action. But it has been established, on much consideration, as one of the general principles of the law of agency, that the principal is liable civilly in damages for the torts of his agent done for his benefit in the prosecution of his business, and within the scope of the agent's employment, and this rule has been extended to wilful trespasses,

fraudulent misrepresentations, malicious prosecutions and libels. The greatest difficulty has been felt in extending this liability to corporations aggregate. *Reed* v. *Home Savings Bank,* 130 Mass. 443, was an action of tort against a savings bank for malicious prosecution. In the opinion Mr. Justice Lord says, "By the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation;" and many authorities are cited. For additional authorities when the action is for a libel, see *Aldrich* v. *Press Printing Co.,* 9 Minn. 133; *Maynard* v. *Fireman's Fund Ins. Co.,* 47 Cal. 207; *Johnson* v. *St. Louis Dispatch Co.,* 2 Mo. App. 565.

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The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.

As partners are the general agents of each other and of the firm, within the scope of the business of the partnership, we think a test of the question we are considering is the liability of the proprietor of a newspaper in damages for a libel maliciously published without his knowledge by his agent, whom he has entrusted with the management of the newspaper, and this we regard as well settled. *Shepheard* v. *Whitaker,* L. R. 10 C. P. 502. *Dunn* v. *Hall,* 1 Ind. 344. *Andres* v. *Wells,* 7 Johns. 260. *Perret* v. *New Orleans Times Newspaper,* 25 La. An. 170. *Storey* v. *Wallace,* 60 Ill. 51.

Smith v. *Ashley,* 11 Met. 367, rests on its own facts, and decides nothing in reference to the liability of a principal for the malicious acts of his agent, done for his bene-

fit, in the prosecution of his business within the scope of his employment.

Upon this ground of agency, partners have been held liable in civil actions for the fraudulent or malicious conduct of one of them, done without the knowledge of the others, for the benefit of the partnership and within the scope of its business. *Locke* v. *Stearns,* 1 Met. 560. *Gray* v. *Cropper,* 1 Allen, 337. *White* v. *Sawyer,* 16 Gray, 586. *Durant* v. *Rogers,* 87 Ill. 508. *Wolf* v. *Mills,* 56 Ill. 360. *Chester* v. *Dickerson,* 54 N. Y. 1. *Guillou* v. *Peterson,* 89 Penn. St. 163. *Rex* v. *Marsh,* 2 B. & C. 717, 723.

If the liability of the principal for the fraudulent acts of the agent, done within the scope of his employment, be limited to those cases in which the principal derives a benefit from the act of the agent, and a corresponding limitation be put upon the liability of one partner for the fraudulent acts of another, done within the scope of the partnership business, yet when a partnership publishes a newspaper, whatever benefit, if any, is derived from the publication of a libel is necessarily received by the partnership.

The statute requires that an actual malicious intention in making the publication shall be found, if the matter published be true; but we are of the opinion that the Legislature, in enacting this statute, did not intend to change the rules of law whereby one person is made responsible in damages for the wrongs done by another, but left them to be applied according to the principles which govern the administration of the law; and that the court rightly refused to give the ruling requested.

Exceptions overruled.[2]

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[2] *Compare:* Woodling *v.* Knickerbocker, 31 Minn. 268, 1883. (A and B were in the furniture and drapery business. A, without the knowledge or consent of B, placed, or allowed to be placed, on a table in the street window of the store a placard reading as follows: "This was taken back from Dr. Woodling as he would not pay for it;" and also placed about two feet from this placard another, on which was written "Moral: Beware of deadbeats." The person libelled sued A and B as partners. *Held,* he could not recover from B as there was nothing in the nature of the business of the firm "from which authority to one partner or to a servant to gratuitously publish a libel can be implied.")

WILLIAMS *v.* HENDRICKS.

In the Supreme Court of Alabama, 1896.

115 *Alabama Reports*, 277.[1]

Coleman, J.—Section 3296 of the Code of 1886, provides that "any person who cuts down any oak * * * on land not his own, willfully and knowingly, without the consent of the owner of the land, must pay to the owner ten dollars for every such tree," &c. The plaintiff, the appellee, sued to recover the statutory penalty for cutting down thirty-four oak trees. The evidence shows that the defendant and one Hinton were partners in getting staves, and according to their agreement, the defendant furnished the money for the partnership and Hinton attended to the business of getting out the staves. He furnished to defendant at regular stated periods the amounts due parties from whom trees were purchased, and also what was due for labor, and the defendant settled the claims as thus reported. There was evidence tending to show, that Hinton had no authority from defendant to cut trees on any land except by agreement and purchase from the owner, and that the trees in controversy were cut by Hinton for staves without the knowledge and consent of the defendant. One of the questions involved in the case was, whether the fact that defendant and Hinton were partners in the stave business subjected the defendant to the statutory penalty. * * *

If in the case at bar the plaintiff had sued to recover the consequential damages sustained by the tortious cutting of the trees by Hinton, the partner, we would without hesitation, under the well settled principles (declared in the foregoing cases), hold that defendant was responsi-

[1] The Reporter's statement of the facts is omitted.

ble for such damages, resulting naturally and proximately from the tortious acts of his partner, done in the range of the partnership business. The penalty is not imposed for a mere mistake or negligence in cutting the trees. The cutting must be done knowingly and willfully. Different principles arise when it is sought to hold a principal responsible for the criminal acts of his agent or servant. The act is highly penal, and must be strictly construed; and before a party can be subjected to its penalties, it must clearly appear that he has violated it knowingly and willfully. It is not enough in such a case, that a partner or servant, without his knowledge and contrary to instructions and against his assent, has committed the unlawful act. To so hold would be to extend the statute by judicial interpretation beyond its meaning and its positive terms.

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[The Attorneys for the plaintiff had argued:

"Williams is liable by the relation of partner.—*Allen v. Leighton,* 87 Me. 206. The requirement to enter satisfaction of a mortgage is as penal as this case. Yet notice to one member renders the other liable for the penalty.—*Williams v. Bowdin,* 68 Ala. 126; *Renfro v. Adams,* 62 Ala. 305. The statute against cutting trees is no less penal than that satisfying mortgages.—*Postal Tel. Co. v. Brantley,* 107 Ala. 687."]

What was said in the case of *Postal Telegraph Co. v. Brantley,* 107 Ala. 683, and *Ib. v. Lenoir, Ib.* 640, is wholly correct when applied to the common law action for the recovery of damages. A decision of the question now considered was not before the court in either of those cases, and what was said with reference to the liability of a principal for the statutory penalty was merely *dictum.* We have been referred to the case of *Renfro & Andrews v. Adams,* 62 Ala. 302, where the action was for the recovery of the penalty imposed for a failure to enter satisfaction of a mortgage under section 2223 of the Code of

1876. We approve of all that was said and decided in that case. The mortgage was executed to the partnership as a unit, and the action was against the partnership as a unit. The statute imposed the penalty upon "any mortgagee who failed to enter satisfaction after notice by the mortgagor." The duty was imposed upon the partnership as mortgagee. The question was, whether notice to one partner was notice to the partnership. We do not doubt that it was correctly held to be sufficient. Under the one act, mere negligence or failure to act incurs the penalty. In the other, an affirmative act knowingly and willfully done is necessary.

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Reversed and remanded.[2]

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[2] Where the state imposes a penalty for "knowingly" violating an Act, as the receipt of goods on which the duty has not been paid, the innocent partner would apparently not be liable in an action for the penalty, even though his co-partner took the goods in the course of the business knowing them to be smuggled. The early English cases against partners to collect the penalty for the violation of the Revenue Laws are cases in which all the partners "knowingly" violated the Act. See Attorney General *v.* Burges, Bunb. 223, 1726; King *v.* Manning, Com. Rep. 616, 1739. These cases are mistakenly cited by Story for the proposition that the innocent partner in such a case would be liable. See Story on Partnership, Sec. 166.

Where the state imposes a penalty for the violation of an Act, without inserting the word "knowingly," it has been held that a principal is liable to conviction on information where the Act was violated by his servant acting in his business. Mullins *v.* Collins, L. R. 9, Q. B. 292, 1874. *Compare:* Newman *v.* Jones, L. R. 17, Q. B. D. 132, 1886. Apparently the same should hold true if the person violating the Act was the partner of the person against whom the information was brought.

All partners are, of course, liable in an action by the government brought to recover the actual amount of the duties on goods imported by the partnership, which, by mistake or fraud, have not been paid. Attorney General *v.* Stranyforth, Bunb., 97, 1721.

WHITTAKER *v.* COLLINS.

In the Supreme Court of Minnesota, 1885.

34 *Minnesota Reports*, 399.

Mitchell, J. This is an action for damages caused by the negligence and unskilfulness of defendant as a physician and surgeon. It appears from the complaint, in substance, that defendant and one Graff were copartners as practising physicians and surgeons; that, plaintiff's leg having been broken, he employed the *firm* to set it, and to care for and treat him professionally; that part of the time Graff attended him, and did his work skilfully; that the remainder of the time his partner, the defendant, attended the plaintiff, and performed his duties negligently and unskilfully, causing the injuries complained of. Both were acting in the line of their partnership business, and under and in pursuance of the employment of the *firm* professionally by the plaintiff.

The court below having sustained a demurrer to the complaint on the ground of a defect of parties defendant, the sole question raised by this appeal is whether Graff, defendant's partner, should have been made a party defendant. The admitted rule is that in actions on contract all persons jointly liable must be sued, but that in actions for tort, disconnected from any contract, the tort-feasors need not be joined. The question is, what rule applies in what are sometimes called actions for torts founded on contracts, or actions *ex quasi contractu?*

The principle running through all the cases seems to be that where the action is maintainable for the tort simply, without reference to any contract between the parties, the action is one of tort purely, although the existence of a contract may have been the occasion or furnished the op-

portunity for committing the tort. But where the action is not maintainable without pleading and proving the contract,—where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance,—it is, in substance, whatever may be the form of the pleading, an action on the contract, and hence all persons jointly liable must be sued. 1 Chit. Pl. 87; Pomeroy on Remedies, § 282; Dicey, Parties, 437; 1 Lindley on Partnership, 482; 2 Collyer, Partnership, § 732; *Powell* v. *Layton,* 2 Bos. & Pul. 365; *Max* v. *Roberts,* Id. 454; *Cabell* v. *Vaughan,* 1 Wms. Saund. 288*h,* 291*c,* 291*f; Weall* v. *King,* 12 East, 452; *Bretherton* v. *Wood,* 3 Brod. & B. 54; *Walcott* v. *Canfield,* 3 Conn. 194.

According to this test it seems to us clear that this is an action on the contract. The gist and *gravamen* is the breach of its terms, which, whether express or implied, were that these physicians and surgeons would treat the plaintiff with ordinary professional skill and care. It would have been impossible for plaintiff to state his cause of action without alleging the contract, for the liability of the defendant arose solely out of it, and not out of some general common-law duty independent of contract.

The only cases which appellant cites in support of his contention are *Govett* v. *Radnidge,* 3 East, 62, and *White* v. *Smith,* 12 Rich. 595. The first of these cases has been overruled, and is no longer considered law. The latter was an action for damages for the loss of a slave killed through the negligence of a partnership, while in their charge under a contract of hire. The court placed its decision wholly upon the ground that the *gravamen* of the suit was not the contract, but the negligence of the defendant, and that the contract was mere matter of recital to explain that the slave was in charge of the defendant, and adds: "Proof of any other process by which the charge resulted would have been admissible." At least this is the ground upon which the court decided the case,

and is the only one upon which the decision can be sustained, if at all. But in the case at bar the foundation of the action is the contract, and the *gravamen* of it its breach. There is no force in the suggestion that Graff was not a necessary party because personally innocent. This same suggestion was made by counsel in *Powell* v. *Layton, supra.* The act of one partner in the line of the copartnership business is the act of all.

Order affirmed.

PAGE *v.* CITIZENS' BANKING CO.

IN THE SUPREME COURT OF GEORGIA, 1900.

111 *Georgia Reports*, 73.

COBB, J. Page brought suit against Ashburn, Peacock, Edwards, Lietch, Williams, Rogers, and the Citizens' Banking Company of Eatonton, which was alleged to be a partnership composed of the five persons first above named. The petition contained three counts, one for malicious prosecution, one for malicious arrest, and one for false imprisonment.[1]

The facts alleged in each of the counts were, in substance, as follows: Rogers was the sheriff of the county, and as such had levied a mortgage execution in favor of the Citizens' Banking Company against petitioner upon a certain stock of goods, which was in the possession of the sheriff under the levy at the former place of business of petitioner. Lietch and Rogers united in making an affidavit that "thirty-one suits of men's clothing have recently been taken from the storehouse occupied by J. D. Page and held in custody of J. C. Rogers, sheriff of Dodge county, Georgia, under levy of a mortgage fi. fa., and now occupied by W. H. Clements, and the same has been taken by criminal means and carried away, and that they believe and have probable cause to believe that the said property is now concealed in the dwelling and premises occupied by J. D. Page, located on College street, in the town of Eastman." On this affidavit a warrant was issued, directing that the house and premises of Page be searched, and, if the property described in the affidavit be found therein, that he be arrested and, together with the property so found,

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[1] Only so much of the opinion as relates to the demurrer to the count for malicious prosecution is reprinted.

brought before some judicial officer, to be dealt with as the law directs. It was distinctly alleged in the petition that when Lietch and Rogers made this affidavit they were acting for themselves as well as for the Citizens' Banking Company, and with the approval and by the direction of each member of that partnership. The warrant issued on this affidavit was placed in the hands of the town marshal and county bailiff, and the house and premises of petitioner were thoroughly searched. None of the property described in the affidavit was found therein, but the officer seized three pieces of dress flannel and two suits of children's clothes, and arrested petitioner. Subsequently to the arrest, the bailiff, with other persons, returned and made another search of the premises, but found none of the property described in the affidavit. Petitioner was taken before a justice of the peace, when Lietch, Edwards, and Williams, acting for themselves and for the other members of the firm, appeared to prosecute plaintiff, with an attorney who was employed by the Citizens' Banking Company as a partnership and each and all of the members of the same. In pursuance of that employment such attorney did represent the prosecution against the plaintiff from its inception to its termination. Petitioner asked that he be released from custody, on the ground that the affidavit upon which the warrant was issued was defective and void and failed to charge any offense against him, and that for that reason his arrest and detention were unlawful. Lietch, Edwards, and Williams objected to the release of petitioner, and the magistrate refused to order his discharge. He then asked for an immediate investigation or preliminary trial, but the parties just referred to objected to this, and upon their application the hearing was continued to the next day. To avoid being placed in jail, petitioner offered to give a bond for his appearance, but the magistrate held that a bond must be given to appear and answer for the offense of larceny, and petitioner gave the bond

to appear for a preliminary hearing on the next day for the offense of larceny.

At the time fixed for the preliminary trial, Rogers, Lietch, Edwards, and Williams, acting for themselves and with the approval of Ashburn and Peacock, the other members of the partnership, again appeared with their attorney before the magistrate for the purpose of prosecuting petitioner, and on their motion the case was again continued until the following day, over the objection of petitioner, who was present and demanding a hearing. At the time fixed in this last order of postponement, petitioner appeared with his counsel before the magistrate, and thereupon the prosecution, by their attorney, asked leave of the court to withdraw the warrant and to restore to petitioner the articles which had been seized by the officer who searched his house; the attorney representing the prosecution stating that it was impossible to make out a case. An order was then granted, discharging petitioner from custody, and restoring to him the articles which had been seized. It was distinctly alleged that while Rogers and Lietch, the persons upon whose affidavit the warrant was issued, were the nominal prosecutors of petitioner, Ashburn, Edwards, Williams, and Peacock, and the Citizens' Banking Company as a partnership, were all jointly and severally the prosecutors in the case. Petitioner alleges that he was innocent of any offense, and that he did not take and carry away any of the articles named in the affidavit, nor were any of them concealed in his dwelling or about his premises, and that the prosecutors had no probable cause whatever to believe that the same were so concealed; that the articles seized by the officer constituted no part of the property mentioned in the affidavit, but were the property of petitioner, his wife and children, and had never been in the possession or custody of Rogers. Petitioner was in actual custody of the arresting officers for several hours, and was in their constructive custody for forty-three hours

before he was released. It is alleged that the prosecution was maliciously instituted and carried on without probable cause, the prosecutors having no ground whatever for the proceeding, other than their desire to injure petitioner. As matter of aggravation and as evidence of malice, it is alleged that the defendants circulated disparaging and damaging reports about petitioner, charging that large quantities of goods stolen from the custody of the sheriff had been found by the officers in the house of petitioner, that he had a secret key to the store in which such goods were located, and that he had taken such goods.

To this petition the defendants filed demurrers, both general and special. The court sustained the demurrers and dismissed the petition, and this ruling is assigned as error. * * *

1. Is a partnership ever liable as such in an action for a malicious prosecution? If so, under what circumstances can such an action be maintained? One partner may be rendered liable for the acts of his copartner. Whether or not he is so liable is to be determined by the application of the rules governing the relation of principal and agent; and generally the partnership is liable for the act of one of the partners if it would have been liable had the same act been committed by an agent intrusted by the firm with the management of its business. 17 Am. & Eng. Enc. L. (1st ed.) 1066. If a tort be committed by one partner while engaged in a transaction within the scope of the partnership business, and such tort be committed in furtherance of the interests of the partnership, it will be liable. But it will not be liable for a tort committed by one partner in a transaction outside of the partnership business, where he acts from his own private malice or ill will, unless the act which constituted the tort was authorized by the members of the partnership or subsequently ratified by them, the act itself having been done in their behalf and interest. Mechem, El. Part. §§ 204, 205; Parsons, Part. (4th ed.) §§ 100, 102;

1 Bates, Part. § 461; 1 Lindley, Part. §§ 149, 150; 1 Jag. Torts, § 99; Barbour, Part. to Ac. (2d ed.) ch. 2, § 13, top p. 350. The authorities just cited establish simply that as a partnership is an aggregation of individuals, where each one is the authorized agent of the others to perform any act within the scope of the partnership enterprise, if one of them in the prosecution of the business of the partnership be guilty of a wilful wrong toward another, the other partners will be liable; and that if one partner is guilty of an act outside of the partnership business, which causes an injury, the other partners will not be liable unless it appear that such act was expressly authorized by them, or after the same had been performed in their behalf and interest they had either expressly ratified the same or knowingly received the fruits of the wrongful act. Applying these principles to the present case, the petition set forth a cause of action as against the individuals who compose the partnership known as the Citizens' Banking Company, and the plaintiff has a right to maintain the action, so far as the count for malicious prosecution is concerned, against the individuals composing that partnership. But the suit is not only against the individuals; it is against the partnership itself, and a judgment is sought against the partnership itself as well as against the individual members who compose it. It is well settled that a corporation is liable for torts committed by its agents, such as assault and battery, libel, malicious prosecution, and the like. *Behre* v. *National Cash Register Company,* 100 *Ga.* 213; 1 Lawson's Rights & Rem. § 367; Newell, Mal. Pros. § 102; *Columbus & Rome Ry. Co.* v. *Christian,* 97 *Ga.* 56; *Ga. R. R. & Bank. Co.* v. *Richmond,* 98 *Ga.* 495. Whether a partnership can be sued as such and held liable for a tort in the commission of which all of the members united for the purpose of furthering the interests of the partnership, or whether in such a case the individuals only are liable to be sued, either jointly or severally, is a question which is for the first time presented to this court

for decision. Can a partnership itself be regarded as being so separate and distinct from the individual members of the same that it may be treated as the wrong-doer, and a judgment be rendered against it which would bind partnership assets in the same manner that a judgment rendered against it on a contract would bind such assets?

A corporation is a person, and therefore it is clear that the decisions uniformly holding that it may be rendered liable for a tort committed by its agent are undoubtedly sound. "Though a firm or partnership is not a person, it is a legal entity, and, for some purposes, is recognized as a *quasi* person having powers and functions exercisable by one of the partners severally or all of them jointly." *Drucker* v. *Wellhouse*, 82 *Ga.* 129. In the opinion in the case just cited Mr. Chief Justice Bleckley says: "A firm adds nothing to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural world. Still, the law does take note, on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and obligations. Judgment may be entered and execution issue for or against it. Code, §§ 1899, 3576. [Civil Code, §§ 2638, 5346.] Attachment may issue against it as non-resident, *Chambers vs. Sloan*, 19 *Ga.* 84; *DeLeon* v. *Heller*, 77 *Ga.* 740; or as absconding, *Hines* v. *Kimball & Co.*, 47 *Ga.* 587. It may be served with process, *Peel vs. Bryson*, 72 *Ga.* 332. It may be taxed, *The Mayor vs. Hines*, 53 *Ga.* 616; and see many provisions in the session laws imposing taxes. It may be insolvent, Code, § 1918 [Civil Code, § 2660]; *Bennett vs. Woolfolk*, 15 *Ga.* 213; *Daniel vs. Townsend*, 21 *Ga.* 155; *Pullen vs. Whitfield*, 55 *Ga.* 174; *Anderson vs. Pollard*, 62 *Ga.* 51. It may assign its property to pay its creditors, but whether by general law a single partner can make for it a general assignment seems open to question. Bur. on Ass. § 67 *et seq.*; Story Par. §§ 101, 310; Parsons Par. 165, 166, 400. As to restrictions on limited partnerships in the matter of assignments, see

Code, §§ 1939, 1940 [Civil Code, §§ 2681, 2682]. According to Parsons (Partnership, 449), there is a 'general tendency of the law at this day to complete its recognition of a parnership as a body of itself, with its own means appointed to its own debts. In view of this tendency, which is everywhere traceable, and no less in our own local system than elsewhere, we may safely hold that though a firm or partnership is impersonal or non-personal, it is, for some purposes, in contemplation of law a *quasi* person, having powers and functions exercisable by one of the partners severally or all of them jointly. That it may be a debtor or a creditor within the meaning of modern statutory enactments, we have no question." In that case it was held that an insolvent firm might make an assignment as an insolvent debtor, though the partners themselves as individuals might be solvent. See also *Green* v. *Willingham,* 100 *Ga.* 224. If a partnership may be considered as an entity so as to be subjected to suit as such in the cases referred to in the decision from which the above quotation is made, we do not see why upon principle a partnership might not be treated as an entity and suable as such by one who had been the subject of a wrong committed by the concurrent action of all the members of the partnership, in the prosecution of a transaction instituted and carried on for the purpose of punishing one who was charged with despoiling the partnership of its property as well as for the purpose of recovering property which was owned by the partnership. Such is the case made by that count in the petition which seeks damages for the malicious prosecution which it is distinctly alleged was instituted and carried on by the direct authority of each and every member of the partnership acting both in their individual capacities and as members of the firm.

It has been held that if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are in fact privy to the malicious prosecution. Arbuckle *v.* Taylor, 3 Dowl.

160, cited in Newell on Malicious Prosecution, § 103. It would seem to follow from this ruling, that if all of the members united in instituting and carrying on the prosecution, the firm would be answerable; and such are the allegations in the present case. In nearly all of the cases where it is sought to hold the partnership liable for a tort, upon examination of the fatcs it will be found that the suit was not against the partnership as such, but was against one or more members thereof sued severally or jointly, as the case may be. See Durant *v.* Rogers, 87 Ill. 508; Rosenkrans *v.* Barker, 3 N. E. (Ill.) 93; Farrell *v.* Friedlander, 18 N. Y. Supp. 215; United States *v.* Thomason, 4 Bissell, 99. In some of the cases just cited it was ruled that under the facts of the case the partnership was liable, and in others that it was not. Attention is called to them for the purpose, as above indicated, of showing that they are not authority either way on the proposition as to whether a partnership can be sued as such for a tort. In Schwabacker *v.* Riddle, 84 Ill. 517, it was held: "Partners are liable *in solido* for the torts of one, if committed by him as a partner and in the course of the business of the partnership." A ruling in almost identical language was made in McIlroy *v.* Adams, 32 Ark. 315. Upon examination of these cases it will be found that the suit in each instance was against the individuals and not against the partnership. In the matter of Ketchum and others, Bankrupts, 1 Fed. Rep. 815, it was held that a firm was liable if one of its members converted to the use of the firm the property of another, and that it was immaterial whether the other members of the firm were ignorant of the wrong or innocent of any wrongful intent. There was in that case, however, no ruling as to how a suit for such wrongful conversion should be brought, whether against the partnership as such or against the individuals composing the same. The only cases to which our attention has been called in which the partnership as such was sued for a tort are the cases of Mark *v.* Hastings, 13

So. Rep. (Ala.) 297, and Kirk *v.* Garrett, 84 Md. 383. In the former it was held: "A partner is not liable for a malicious prosecution instituted by his copartner on a charge of larceny of partnership property, unless he advises or directs it, or participates therein, and then only in his individual capacity." In the latter case it was held that under the facts of that case the firm was not liable, but the judge who wrote the opinion recognized that there were cases in which it might be held liable for the torts of its members. See page 410. While the prosecution of a person for a criminal offense might not be within the scope of a mercantile partnership, even though such offense consisted of a larceny of the partnership property, as was held in the Alabama case, *supra,* still it would seem that any proceeding authorized by law for the purpose of reclaiming property of the partnership which had been stolen would be within the scope of the partnership business, and each partner would be authorized to use such remedies as the law gave for that purpose; and if these remedies were pursued maliciously and without probable cause and a prosecution for a public offense resulted therefrom, the partnership as such would be liable in an action of malicious prosecution. But be this as it may, it is not necessary for us to decide this question in the present case, for the allegations of the petition are clear and distinct that every act that was done by the partner who sued out the search warrant was authorized and directed by each and every other member of the firm acting in behalf of the partnership. Treating the partnership as a legal entity and as a *quasi* person, as we are not only authorized but bound to do, following the decision in *Drucker* v. *Wellhouse,* supra, we have no hesitancy in holding that under the allegations of the petition an action for malicious prosecution was maintainable against the Citizens' Banking Company as a partnership, and that the plaintiff is entitled under his allegations to recover a judgment which will bind partnership assets.

Judgment reversed.

SECTION 4.—LIABILITY IN QUASI CONTRACT AND IN EQUITY.

MANUFACTURERS' AND MECHANICS' BANK *v.* GORE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1818.

15 *Massachusetts Reports*, 75.[1]

PARKER, C. J., delivered the opinion of the Court.—We think the principle, that when, by means of a felony, one has been deprived of his property, the civil remedy is merged in the felony, if existing in full force in this country, in the manner laid down in some of the *English* authorities, does not apply to this action; which is not founded upon a felony, but upon a common contract for the loan of money, in which the lender has been deceived by the borrower, and deprived of the security upon which the loan was assented to. How far the principle may be applicable to a different class of these unfortunate cases, which have been argued at the present term, we do not determine; as those actions are too important in their consequences to be decided while a particle of doubt remains in the minds of any of the Court.

The facts in this case show that the defendant *Grafton* proposed to the bank to present a note, in which he and his partner should be promisors, and Mr. *Cushing* and Mr. *Scudder* endorsers, for discount; that, the proposal being agreed to, a note was made by *Grafton,* in the name of the house of *Gore & Grafton,* purporting to be payable to *Thomas Cushing;* that *Grafton,* having forged the names of the supposed endorsers, presented it to the bank for

[1] The Reporter's statement of the facts is omitted.

discount; and that the amount, deducting the discount, was passed, in the bank books, to the credit of *Gore & Grafton,* they being indebted to the bank on other notes previously given in the same manner, on which similar forgeries had been committed by *Grafton.* [Gore did not have any knowledge of Grafton's crimes.]

The bank, finding the security upon which they had agreed to make the loan had failed, by reason of the forgery of the names of the endorsers, and that they had thus been defrauded of a large sum of money, commenced this action, declaring for money had and received, and for money lent and accommodated, although the term of credit agreed upon the loan had not expired. They do not claim through the crime of *Grafton;* and it is immaterial to them, for the purposes of this suit, whether the security failed because of the forgery, or because the ability of the endorsers was not such as may have been represented, to induce them to make the loan.

It is a case, as respects the plaintiffs, of money obtained from them by misrepresentation and fraud; and we think the only question is, whether, upon a loan thus obtained, although upon credit, the bargain may not be disaffirmed by the lender, and an action presently commenced for money so obtained, as had and received, in a legal view, to his use. And upon this point we have no doubt; and we believe the doctrine has been generally received and practised upon in this commonwealth, that, when goods are purchased upon credit, or money borrowed, and the security agreed upon by the parties turns out to be of no value, and different from what it was represented to be by the debtor, it may be treated as a nullity, and an action will lie immediately for the sum it was intended to secure.

* * * *

The case, then, is too clear to be doubted, as it respects *Grafton,* in the enormous frauds committed upon those with whom he dealt. How does it stand with re-

spect to *Gore,* the innocent victim?—We regret to say, equally clear. The partnership was general. *Grafton* was the business man out of the store; all the business at the banks, and in obtaining credits of individuals, was managed by him. He had full right to bind the firm to any extent, in contracts for the use of the partnership. The proceeds of these very notes were placed to the credit of the house in the books of the bank, and actually went to their use, to pay preëxisting debts in the bank. So the jury must have found; and the facts warrant the finding. We consider the direction of the judge on both points correct in point of law, and that the verdict was a necessary result from the facts proved in the case.

Judgment on the verdict.[2]

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[2] *Compare: Strang* v. *Bradner,* 114 U. S. 555, 1884. (The Bankrupt Act of 1867 excepted from the operation of a discharge any "debt created by the fraud * * * of the bankrupt." D and E were partners in the wool commission business. A, B and C were partners in the business of purchasing wool, which they sent to D and E to sell for their account. D and E, for the accommodation of A, B and C, sent to them from time to time notes on which A, B and C raised money for their own use. D and E met the notes at maturity out of the proceeds of the sale of the wool and out of their own funds, crediting A, B and C with the notes, and the price received for the wool, and debiting them with the amounts paid on the notes. A, B and C asked D and E for four notes of about $4000 each. The notes were sent and also a consignment of wool. A, without the knowledge of B and C, wrote in the name of the firm to D and E, saying that the notes could not be used and asking for others in their place. D and E complied with this request. A placed both sets of notes in circulation, and the proceeds of both sets of notes went into the business of A, B and C. A, B and C were declared bankrupts. D and E had to meet all the notes at maturity. A, B and C were discharged. D and E brought a suit against A, B and C for the amount lost as a result of their sending the second series of notes. The defendants pleaded their discharge. On appeal, *held,* that the discharge could not be pleaded by any of the defendants. Harlan, J.: "Whether this action be regarded as one to recover damages for the deceit practised upon the plaintiffs, or as one to recover the amount of a debt created by fraud upon the part of [A], we are of opinion that his fraud is to be imputed, for the purposes of this action, to all the members of the firm." P. 561. *Note,* that the Bankrupt Act of 1898 provides that a discharge shall release the bankrupt from all debts except such as "(2) are liabilities for obtaining property by false pretenses or false representations * * *; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting * * * in any fiduciary capacity.")

Ex Parte HEATON.

In the High Court of Chancery, 1819.

1 *Buck's Cases in Bankruptcy*, 386.

Moxon and his two sons carried on business together in partnership. The sons were trustees named in a will for the sale of certain real estates. They sold the estates, and instead of applying the monies arising from the sales according to the trusts of the will, they appropriated them to partnership purposes. A commission of bankrupt issued against *Moxon* and his two sons, and it was admitted that there was not any separate estate. This was a petition on behalf of the cestui que trusts, who were infants, by their father, to prove against the joint estate, the amount of the monies so appropriated by the sons.[1]

The Vice Chancellor [Sir John Leach]:

Those who receive trust property from a trustee, in breach of his trust, become themselves trustees, if they have notice of the trust. If the monies arising from the sale of these trust estates were applied to the partnership purposes with the knowledge of *Moxon,* the father, the firm would become implied trustees, and then the cestui que trusts might proceed either against the sons, as actual trustees, or against the firm, as implied trustees; but there is no evidence that the funds were so appropriated with the knowledge of the father. I shall therefore direct an inquiry as to that fact.[2]

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[1] The Reporter's notes of the argument of counsel for the petition are omitted, as is that portion of the opinion of the Court which deals with a question arising out of the infancy of one of the trustees.

[2] In accordance with the intimation in our principal case, where one partner, with the knowledge of his co-partners, brings into the firm as his contribution to the capital monies which he holds as trustee, the *cestui que trust* may obtain in a bill brought against all the partners an accounting for all the profits made by the improper employment of the funds of the trust in trade. *Flockton* v. *Bunning,* L. R. 8 Ch. App. Cas.

323, note, 1864. Where money belonging to a trust estate is improperly loaned by the trustee to a firm, though the members of the firm are cognizant of the breach of trust, they cannot be made to account in equity for the profits made in the business as a result of the use of the money; they are merely liable for the return of the loan with interest: *Stroud* v. *Gwyer,* 28 Beav., 130, 1860, per Romilly, M. R., p. 141; *Rau* v. *Small,* 144 Pa. 304, 1891. In the Pennsylvania case cited the trustee loaning the money was a member of the firm. Where this is the case the trustee is himself liable for the profits he has received as a member of the firm as a result of the use of the money; but he is not liable for the profits received by the firm or his co-partners. *Vyse* v. *Foster,* L. R. 8 Ch. App. Cas. 309, 1870; Séguin's App., 103 Pa. 139, 1883. As a man who borrows for the purposes of trade money from a trustee is not according to these cases regarded as a constructive trustee of the profits which he makes as a result of the use of money, *á fortiori* it would be impossible, where one or more of the partners were ignorant of the impropriety of the loan, to make the firm or the innocent partners account for the profits made in the use of the money.

MARSH *v.* KEATING.

In the House of Lords, 1834.

2 Clark and Finnelly's Reports, 250.

An action of assumpsit for money had and received brought by Ann Keating against William Marsh, J. H. Stracey, and George Graham. By the special verdict, taken by consent, the following facts were found:

The defendants, with one Henry Fauntleroy, were partners in the banking business, trading as Marsh & Co. Ann Keating owned 12,000l. interest or share in the joint stock called Reduced Three per Cent. Annuities of the Bank of England. She gave to Marsh & Co. a power of attorney to collect the interest on the stock. The business of Marsh & Co. was transacted by Fauntleroy. He ordered T. B. Simpson, a stock broker, to sell 9000l. of the Annuities standing in the name of Ann Keating; the Annuities were transferred into the name of the purchaser, W. B. Tarbutt, by the Bank at the direction of Fauntleroy, the latter presenting to the Bank a power of attorney, which purported to be signed by Ann Keating, authorizing the defendants and Fauntleroy jointly and each of them severally to transfer 9000l. of her Annuities to Tarbutt. The signature to the power of attorney was a forgery. Fauntleroy received from Simpson a check to the order of Marsh & Co. for 6,013l. 2*s.* 6*d.*, being the amount paid by Tarbutt less one-half the usual broker's commissions. The firm of Marsh & Co. kept an account with Martin, Stone & Co., bankers. Fauntleroy deposited the check received for the sale of the Annuities with Martin, Stone & Co., the latter crediting the amount to Marsh & Co. as "cash per Fauntleroy" on the pass book of the firm. The transaction, however, was never noted on any other book of

account kept by the firm. The defendants were ignorant of the forgery of Fauntleroy. Fauntleroy paid in and drew out of Martin, Stone & Co. in the name of Marsh & Co. considerable sums for his own individual use. These transactions, like the deposit of the money received from Simpson, appeared on the pass book of the firm of Marsh & Co., but did not appear in any other account book of the firm. Fauntleroy was indicted for other forgeries, found guilty and executed.

The defendants were bankrupts. The present action was brought as a result of a direction of the Lord Chancellor, in order to determine whether Ann Keating, who had proved her debt under the commission, should have her proof expunged.

Judgment was entered in the Court of King's Bench, without argument, for the plaintiff. This judgment, also without argument, was affirmed by the Exchequer Chamber.

The Defendants below accordingly brought their Writ of Error in Parliament. The Lords having considered the case proper for the assistance of the Common Law Judges, the following learned Judges attended the House during the arguments: Chief Justice Tindal, Mr. Justice Park, Mr. Baron Bayley, Justices Bosanquet, Gaselee, Littledale, Taunton, Vaughan, J. Parke, and Patteson, and Barons Bolland and Gurney.[1]

The *Lord Chancellor* moved the postponement of the case for further consideration.

His Lordship then suggested the points which he recommended to be comprised in the questions, which are stated in the subjoined opinion.

Mr. Justice *Park* now delivered the opinion of the Judges:—The question which your Lordships have been pleased to propose for the opinion of His Majesty's Judges, amounts in substance to this,—whether the produce of

[1] The facts are restated, and the arguments of counsel omitted.

stock formerly standing in the name of Mrs. Ann Keating, the Plaintiff below, but transferred out of her name on the 29th of December 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the Defendants below, the bankers of Mrs. Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners to the use of the Plaintiff below, and be recovered by her in that form of action. And after hearing the argument at your Lordships' bar, and consideration of the facts stated in the special verdict, all the Judges who were present at the argument, including the Lord Chief Justice of the Common Pleas, who is absent at Nisi Prius, and Mr. Baron Bayley, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative. * * *[2]

The general proposition, that where a party who has been injured has different remedies against different persons, he may elect which of them he will pursue, is not called in question. If the goods of A are wrongfully taken and sold, it is not disputed that the owner may bring trover against the wrong-doer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price; but it is objected that such general rule will not apply to the present case, on various grounds of objection which have been advanced on the parts of the Defendants in the action.

Those objections appear to resolve themselves substantially into four: first, it has been urged that the transfer in this case being an act not voidable only, but absolutely void, it is incapable of being confirmed by any vol-

[2] His discussion of the contention that Mrs. Keating had not suffered any loss, as the transfer under the forged power was a nullity, is omitted. The opinion of the judges on this point was against the plaintiffs in error.

untary election of the party who has made it; secondly, that at all events, in this case such election is taken away, upon grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would, in effect, be to affirm a sale completed through a felony, and would give the Plaintiff a right of action arising immediately out of the felony itself; thirdly, that it does not appear from the facts found in the special verdict, that the money produced by the sale of stock came into the hands of the Defendants below under such circumstances as would constitute it money had and received by the Defendants below to the use of the Plaintiff; and lastly, that by the subsequent transactions between the Plaintiff and the Bank of England, she has lost any right of action against the Defendants, if she ever possessed it. * * *[3]

But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the Defendants below, so as to be money received by them to the use of the Plaintiff; and the consideration of this objection involves two questions: First, did the money actually come into the possession of the Defendants? Secondly, if it ever was in their possession, had the Defendants the means of knowledge, whilst it remained in their hands, that it was the money of the Plaintiff and not the money of Fauntleroy? As to the first point, the special verdict finds expressly, that Simpson, the broker, paid the sum of 6,013*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt (deducting one-half of the usual commission), by a cheque payable to Marsh & Co., into the hands of Martin & Co., to the account of Marsh & Co., at the precise time of such payment; therefore, there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s, by any customer under

[3] Only so much of the remainder of the opinion of the judges as relates to the third objection is reprinted. The judges were of the opinion that the other objections were not well founded.

ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the balance into their own hands: if the same money had been paid into Martin & Co.'s, as the produce of the Plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the Defendants to the use of the Plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as "Cash per Fauntleroy;" or because it never appeared in the house-book or any other book of Marsh & Co., but only in the pass-book of that firm with Martin & Co.; or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it had once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged, that the present Defendants had no knowledge that the money was the property of the Plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at Martin & Co.'s. It must be admitted, that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the Plaintiff's stock; but it is equally clear that the Defendants might have discovered the payment of the money, and the source from which it was derived, if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had all the means

of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

* * *

Upon the whole, therefore, we beg to state our opinion to be, that upon the question which has been proposed to us by your Lordships, Mrs. Keating has the right to recover the produce of her stock against the surviving partners of the firm who received it, under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires it to be expressly understood, that he fully concurs in the opinion now delivered.

The *Lord Chancellor* coming into the House said:

* * *

The learned Judges have all agreed in opinion, in support of the judgment below. I therefore move your Lordships that that Judgment be affirmed; but at the same time without costs, in consideration of the importance of the question, and the opinion of the Court below having been in favour of taking the sense of your Lordships' House.

Judgment affirmed without costs.

BLAIR *v.* BROMLEY.

In the High Court of Chancery, 1847.

2 Phillip's Chancery Reports, 354.

In the year 1820, *William Bromley,* who had for many years previously carried on business as an attorney and solicitor at *Gray's Inn,* took his brother, the defendant *Joseph Walter Bromley,* into partnership with him, the terms of the partnership being that the latter should advance 1000*l.*, which was to be repaid to him at the expiration of five years, during which he was to be paid a salary as clerk in lieu of a share of profits; and that from and after that time he should be interested in one-third of the profits and losses of the concern as a partner. That arrangement was acted upon in all respects, and an account which *William Bromley* then kept with Messrs. *Rogers, Twogood* and Co. bankers in *London,* and in which there was a considerable balance standing to his credit, was transferred into the joint names of the two brothers. In the apportionment of the business between the partners, the agency business was undertaken by *Joseph Walter Bromley,* while his brother reserved to himself the exclusive management of the concerns of those individual clients whom he then had or might afterwards procure by means of his personal connection.

Among other clients of that description was one *Thomas Blair,* who died in 1828; after which, the plaintiffs, who were his executors, continued in that character to employ the Messrs. *Bromley* as their solicitors in all matters connected with the trust, and, amongst others, in the investment of moneys belonging to the estate, the income of which was given by the testator to his widow for her life. In the year 1829, having been informed by *Wil-*

liam Bromley that he had an opportunity of investing a sum of 4500*l.* as mortgage of an estate of a Mr. *Seabrook,* the plaintiffs, who resided at *Bath,* drew a cheque for that amount on the executors' account at the Bank of *England,* crossed with the names of Messrs. *Rogers, Twogood* and Co., and made payable to *Seabrook* or bearer, and enclosed the same in a letter to *William Bromley,* with instructions to invest the amount on the proposed mortgage. The cheque was duly presented by Messrs. *Rogers* and Co., and the amount was received and placed by them to the credit of the account, at their bank, of the Messrs. *Bromley.* The mortgage transaction went on between *William Bromley* and Mr. *Seabrook,* and was on the point of being completed, when it was broken off by the latter, and the money was never invested. *William Bromley,* however, not only concealed that fact from the Plaintiffs and Mrs. *Blair,* but in several accounts, which he rendered to them from time to time at their request, of the investments he had made for them, he included this sum of 4500*l.* as invested on *Seabrook's* mortgage; and in the sums which he from time to time transmitted to Mrs. *Blair* as interest on the investments which he had been employed to make, he regularly included the amount of interest at 5 per cent. upon the 4500*l.* as if it had been actually invested.

In the year 1834 the partnership between the Messrs. *Bromley* was dissolved by mutual consent; the accounts between them were settled; and the balance then standing to the joint account with Messrs. *Rogers* and Co. was transferred to the separate account of *William Bromley,* who continued to carry on his business upon the same premises, and to act as solicitor for the Plaintiffs and the *Blair* family in the same manner as before, except that in the subsequent communications with him the name of the partnership firm was dropped. Mrs. *Blair* died in the year 1841, after which the payments of interest on the aggregate amount of the supposed investments fell into arrear;

and in 1844 *William Bromley* became bankrupt, the non-investment of the 4500*l.* was discovered, and this bill was filed against *J. W. Bromley* to make him liable for that sum, with the arrears of interest at 5 per cent.

The defence set up by the answer, and the truth of which, in point of fact, was satisfactorily established by the evidence, was, that no part of the sum in question had ever actually come to the hands of the defendant, and that he had never had any personal knowledge of the transaction, or any personal communication with the Defendants, or any of the *Blair* family in reference to it, the whole of the business having been under the sole and exclusive management of *William Bromley.*[1]

Lord Chancellor Cottenham:

In this case the payment of the 4500*l.* into the funds of *William Bromley* and his partner, for the purpose of investment, is proved, and their liability admitted. Afterwards Mr. *Bromley,* one of the partners, representing that it had been invested, paid sums equal to the interest, and made a charge in a bill of costs for some of the expenses incident to such investment.

Whether the Defendant knew of the transaction or not, he certainly had the means of knowing it. But neither is necessary; for the duty of laying out the money was in the ordinary course of the business of the firm; and they had undertaken it; and in that case I agree with what is laid down by the Master of the Rolls in *Sadler* v. *Lee* [6 Beav. 330], that all the partners became liable for the several acts of each. In *Sadler* v. *Lee* the act consisted of abusing the power which the owner of the fund had conferred upon the several members of the firm by his power of attorney. In this case the act consists in representing that the 4500*l.* had been invested on the security; but in *Bate* v. *Scales* [12 Ves. 402], where a similar representa-

[1] The further elaboration of J. W. Bromley's defense by the Reporter, and his note of the argument of counsel for the plaintiff are omitted.

tion had been made by a trustee, who ought to have invested money in stock, Sir *William Grant* "considered the case of a representation that the stock did exist, as precisely a parallel case to the actual existence of the fund in stock upon that day, which stock was sold out." In the present case, the misrepresentation continued until the fraud was discovered: the case therefore, according to Sir *W. Grant,* is the same as if on that day the fund, having been previously invested, had been called in and received by Messrs. *Bromley,* in which case there could not have been any question as to the Statute of Limitations.

Those who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of the non-performance; *Brown* v. *Southouse* [3 *Bro. C. C.* 107], which was the case of an agent; *Evans* v. *Bicknell* [6 *Ves.* 182], where Lord *Eldon* lays down the rule generally. In *Barwell* v. *Parker,* Lord *Hardwicke* applied the rule to the case of a scrivener who had undertaken to lay out money. The principle, indeed, is deeply rooted in our equitable jurisdiction, as in *Middleton* v. *Middleton* [1 *Jac. & W.* 96], and *Luttrell* v. *Olmius,* referred to by Lord *Eldon* in *Mestaer* v. *Gillespie* [11 *Ves.* 638].

What, then, is the nature of the liability which so arises from the misrepresentation? Merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same situation as if the fact represented were true. The misrepresentation was probably made for a fraudulent purpose; but the consequence is a merely civil liability; and as one partner may certainly bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one.

I am, therefore, of opinion that *William Bromley's*

partner, though he had no knowledge, or means of knowledge, of his misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the Plaintiff's right until the discovery of the fraud.

What I have already said, and the cases to which I have referred, make it unnecessary to say much upon the objection that the Plaintiff's remedy, if any, is at law. In all these cases the effect of the misrepresentation raises an equity to restore the parties deceived as nearly as possible to the situation, in which, but for the misrepresentation, they would have stood, and for which damages in an action might be a very inadequate remedy: and it is no objection to this equity that the facts may also support an action. It is more than 120 years since a similar objection was made in *Colt* v. *Woollaston* [2 *P. Wms.* 156] and overruled.

I am, therefore, of opinion that the decree of the Vice Chancellor *Wigram* must be affirmed with costs.

GUILLOU *v.* PETERSON.

In the Supreme Court of Pennsylvania, 1879.

89 Pennsylvania Reports, 163.

Assumpsit by René Guillou, administrator c. t. a. of the estate of Samuel L. Haven, deceased, against Edward W. Gould, Theodore R. Strong, Jesse White, Jr., and Pearson S. Peterson, late copartners as Gould, Strong & Co.[1]

Mr. Justice Paxson delivered the opinion of the court, May 7th 1879.

The court below having entered a judgment of nonsuit against the plaintiffs upon the trial, we have but to consider the single question whether there was sufficient evidence to entitle the case to go to the jury.

The case of the plaintiffs as presented was this: On the seventh day of November 1866, the defendants, Edward W. Gould, Theodore R. Strong and Jesse White, Jr., of the city of New York, and Pearson S. Peterson, of the city of Philadelphia, entered into articles of copartnership, under the name of Gould, Strong & Co., for the purpose of "buying and selling stocks on commission, making loans, collecting promissory notes, drafts and bills of exchange." The partnership was in the form of and was intended to be a limited partnership, the three gentlemen first named being the general partners, residing in New York, where the business was to be conducted, and the said Peterson being the special partner and contributing the sum of $20,000 as cash capital. The partnership was renewed annually to 1877 inclusive, but by an admitted informality in the renewals Peterson became a general partner at the end

[1] The Reporter's statement of the facts, and his notes of the arguments of counsel are omitted.

of the first year so far as the public are concerned, and continued so until its termination. As between the partners, it remained a special partnership. The agreement further specified that the general partners should not engage in speculations of any kind; that Peterson, the special partner, should not in any event be liable for the debts or obligations of the firm beyond the amount of capital ($20,000) contributed by him, and that he should transact no business for the firm, nor be employed for that purpose as agent, attorney or otherwise. Mr. Peterson seldom visited New York, and appears to have taken little if any part in the business.

Theodore R. Strong, one of the partners, was one of the executors of Samuel L. Haven's will. Mr. Haven resided in New York and died in the autumn of 1865. The other executor, Thomas S. Shepherd, took but little charge of the estate; Mr. Strong was practically the acting executor. In the month of February 1867, Gould, Strong & Co. borrowed from Mr. Strong $28,000 of the United States treasury notes, known as seven-thirties, which he held as executor and which belonged to Samuel L. Haven's estate. These notes remained in the possession of the firm and were used by them for the purpose of raising money until June 1868, when, having been called in by the government, they were on the 19th of that month converted into other bonds known as five-twenties. Whether the conversion was by Strong or the firm is not clear. In Strong's account as executor with the firm he is credited on July 6th, 1868, with $28,000 seven-thirties at 109, less commission, $31,453.80, and on the same day he is debited with $28,000 five-twenties, new at 108¾, $30,485. Within a few days thereafter $25,000 of these five-twenties were entered on the blotters and ledger of the firm as loans from Strong. They were used for the business of the firm, as stated by Mr. Strong, "to pay for stocks that we were carrying—stocks for our customers;" and again, "these

stocks and bonds were used, during the years they were held by Gould, Strong & Co., as collaterals to raise money. This money was used in our business." The five-twenties thus loaned to the firm and thus used by them, were never returned to Strong, but were sold to Jay Cooke & Co. by Mr. Gould, on Dec. 14th, 1871, for $28,437.50, and the proceeds used to pay a loan for which they had been pledged by Gould, Strong & Co. For the like purpose of raising money the firm borrowed from Strong, in 1869, 513 shares of the stock of the Pittsburgh, Fort Wayne and Chicago Railway Company, belonging to the said estate, which said stock was continuously used as collateral to raise money until January 8th, 1872, when the firm borrowed the sum of $45,000 from the City Bank upon these 513 shares of stock. The bank was repaid about January 22d of the same year $45,314.09 by the sale of 471 shares of said stock, and the balance thereof, forty-two shares were delivered to Mr. Shepherd, the other executor, who appears to have then learned for the first time of Mr. Strong's *misapplication* of the securities belonging to Mr. Haven's estate.

Gould and White were cognizant of all these transactions, and were active participants therein. There was evidence, and for the purposes of this case it must be taken as true, that Mr. Peterson knew of the transaction of the seven-thirties. Strong says: "He (Peterson) knew of the loan of the treasury notes. *He knew they belonged to me as executor.* He got that information from either Mr. Gould or myself; we were both present. I don't know which of us told him. That was in April, 1868."

No question has been made, indeed none could be made, as to the liability of Strong, Gould and White to Mr. Haven's estate upon this state of facts. Strong, the executor, was guilty of a fraud upon said estate, and Gould and White were participants therein. It was a *misapplication* of the assets of the estate, to use the polite and con-

siderate term in general use to express a breach of trust. In the language of the law and of common honesty, it was an *embezzlement.* It was not the case of a loan of unemployed funds by an executor to his firm, for the purpose of gaining interest for his *cestuis que trustent,* but of the loan of interest-bearing securities to enable the firm to carry on its operations. Such breaches of trust have become so frequent and so startling within the last few years, that we would fail in our duty were we to omit to mark them, when they come before us, with the seal of our stern condemnation.

It remains to consider the question of Mr. Peterson's liability. The right of the plaintiff to waive the tort and sue in assumpsit for money had and received is too well settled to need either argument or the citation of authority. It is alleged, however, that Mr. Peterson is not liable, for the reason, among others, that "by the terms of the partnership articles he was to be liable only to the extent of the capital he had contributed, and the terms of those articles were known to the executor of Haven's will when the securities were delivered for use." This position concedes Peterson's liability to the extent of $20,000. It assumes, however, that the estate of Mr. Haven is in no better position than Strong, the executor, would be. Is this position sound? I concede that if Strong had advanced his own money or his own securities to the firm, he would be bound by the limitation in the agreement between the partners. But this suit is not by Strong or for his benefit. The securities he loaned the firm were not his property. They belonged to Mr. Haven's estate. In the ordinary legitimate dealings of an executor with the assets of an estate, the parties in interest are bound by his acts and perhaps affected with notice. In such case he may, in a qualified sense, be regarded as their agent. But surely this principle cannot apply where an executor is acting in fraud of the rights of the estate. It is opposed to every well-

settled principle applicable to trust funds. Trust property squandered by a faithless trustee can be followed wherever found, and if earmarked equity will lay its strong hand upon it and restore it to its rightful owner. Such owner is not bound by what his trustee has done or omitted to do; and may repudiate or rescind his contracts, saving of course the rights of innocent third parties. Mr. Strong was not acting for his *cestuis que trustent* when he loaned these securities to his firm; he was acting in direct antagonism to them; he was embezzling their securities; he was doing that which was a sufficient cause for his removal by the court having jurisdiction of his accounts. We think that the owners of the securities loaned by the executor to his firm occupy a very different position from the executor himself, and that they are not to be affected with his knowledge of the private understanding or agreement between the partners. That the acts of a trustee in excess of his powers are not binding upon his *cestui que trust* was decided in Bohlen's Estate, 25 P. F. Smith, 304. Much more so where the act is not a mere excess of power but a clear and fraudulent abuse of it.

It is said, however, that Mr. Peterson is not liable for the further reason that the power of one partner to bind the others is at most an implied power; that each partner is the agent of his copartners only when acting in the scope of his power, and in the usual course of the business of the firm, and that when his agency is denied or forbidden by his copartner, with notice to the party assuming to deal with him, as the agent of the firm, his act is not that of the firm, but his individual act only. As an abstract proposition this is correct: Story on Partnership, sections 123 and 138, and note 1, p. 218; Parsons on Partnership, 95; Gallway *v.* Matthew, 10 East, 264; Spooner *v.* Thompson, 48 Vt. 259; Feigley *v.* Sponeberger, 5 W. & S. 564; Yeager *v.* Wallace, 7 P. F. Smith, 365. It does not apply to this case as it stood before the jury when the judgment of non-

suit was entered. The cause has been argued upon the theory that the securities were borrowed for the purpose of using the money in wild speculations prohibited by the agreement of partnership. The evidence is not so. The money was used in the business of the firm, carrying stocks for their customers, &c. It was true the failure of the firm was caused by speculations in stocks in 1872, but there is no evidence that they were engaged in such speculations at the time the securities were borrowed, or that the securities were used for any such purpose. The borrowing of securities may be regarded as the equivalent of borrowing money so far as the responsibility of the firm is concerned. This has always been considered as among the implied powers of a partnership, and when exercised by a partner in the name of the firm, for the business of the firm, and the proceeds so applied, it has always been held to bind the firm unless actual notice can be traced to the person loaning the money that the partner had no authority for such purpose.

Our own books are meagre in authority upon the question of the responsibility of a firm under such circumstances. It has been largely discussed in England, however, in a series of cases growing out of the forgeries of one Fauntleroy, who was convicted and executed for his offence.[2]

* * *

The wrong done here on the part of the firm was in converting the securities. It is manifest they had the custody of them for Strong, and collected the interest and dividends for him. The account shows this. Afterwards they borrowed the securities from Strong. This did not authorize their conversion. It imposed an obligation to return them in specie. If sold it was the duty of the firm to have carried the proceeds to Strong's credit as executor. Instead of doing so Gould sold the five-twenties and with

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[2] His statement of the facts and decision in *Marsh* v. *Keating, supra,* is omitted.

the proceeds paid a debt of the firm, while the railway stock went to pay the $45,000 due to the bank. For both these debts Mr. Peterson as a general partner was individually liable. It is entirely in the course of the regular business of the firm to pay its own debts. I regard the case in hand as stronger than those cited, for the reason that the firm got the benefit of every dollar realized from the securities, while in Marsh *v.* Keating and Stone *v.* Marsh, Fauntleroy cheated his firm as well as the owner of the stock, by appropriating to his own use the money received from the sale of said stock.

It is not meant to advance the broad proposition, that where one abuses his trust, and thereby obtains the means to advance money to a partnership, he thereby raises a contract between the partnership and the person whose money has been so used. The rule is thus laid down in Lindley on Partnership, at page 327: "If a partner, being a trustee, improperly employs the money of his *cestui que trust* in the partnership business, or in payment of the partnership debts, this alone is not sufficient to entitle the *cestui que trust* to obtain repayment of his money from the firm." To the same point are Ex parte Heaton, Buck, 386; Ex parte Apsey, 3 Bro. Ch. C. 265; Jacques *v.* Marquand, 6 Cowen, 497. If Mr. Strong had sold the securities belonging to Haven's estate, and placed the proceeds in the firm as his share of the capital, or had loaned it to the firm as his own money, and without knowledge on their part that it was trust money, they would not have been liable to an action by the representatives of Haven's estate. Here the securities belonging to the estate were sold by the firm, with knowledge of the true ownership, and the proceeds used to pay its debts. This, under the authorities, treating Mr. Peterson as a general partner, which we think he is, would make him liable without notice or knowledge on his part of the borrowing of the securities or their conversion by his partners.

But even if we treat Mr. Peterson as a special partner,

so far as Haven's estate is concerned, this judgment must be reversed. As before observed, the right to recover against the general partners is undoubted. It is equally clear as to Mr. Peterson, if he had notice of these transactions, or might or aught to have known them. There was evidence that he did not know; not as to all, perhaps, or to the full extent of their operations. But he knew in April, 1868, that his firm had borrowed $28,000 of the securities of the Haven estate from the executor. Then was the time for Mr. Peterson to speak. Had he spoken then, as he should have done, Mr. Haven's estate might have been saved from ruin, his firm from its subsequent insolvency, and his own estate from the peril of this litigation. A man who is brought face to face with such an irregularity as this on the part of his firm, cannot shut his eyes and refuse to see it. Whether we regard the transaction as a wrong to the estate, or a violation of the partnership agreement in regard to speculation, it was ample to put Mr. Peterson upon inquiry as to the nature of the transactions of his firm, and if he chose to sleep upon such a disclosure, he has no one to blame but himself. It is no answer to this to say that the seven-thirties were returned, and that he had no subsequent notice. It was for the jury to say whether the alleged return was anything more than a matter of book-keeping, and for any other purpose than that of exchanging the form of the securities. In any event he had a right to examine the books, and after the irregularity referred to it was his duty to have done so. Such examination would have disclosed the conversion of the securities belonging to the Haven estate, and the application of the proceeds to the payment of the debts of his firm. He must now be charged with the knowledge he might and ought to have acquired.

We are of opinion that the case should have gone to the jury, and that it was error to enter a judgment of nonsuit.

The judgment is reversed and a *procedendo* awarded.

CHAPTER VI.

LIABILITY FOR INDUCING MISTAKEN BELIEF IN THE EXISTENCE OF A PARTNERSHIP.

SECTION 1.—WHEN A PERSON IS ESTOPPED FROM DENYING THAT HE IS A PARTNER.

DE BERKOM *v.* SMITH.

IN THE COURT OF KING'S BENCH, AT NISI PRIUS, 1794.

1 *Espinasse's Reports*, 29.

Assumpsit to recover the value of a quantity of foreign lace against the defendants charging them as partners.

It was admitted that *Smith* one of the defendants was liable, but the other defendant *Lewis* denies that he was a partner. This was the only question in the case.

The evidence on the part of the Plaintiff was, That he was a foreigner living at *Lisle in Flanders;* that having been applied to by the defendants for a quantity of lace on credit, that before he would furnish it, he wrote over to his correspondent in *London* to enquire concerning their circumstances and situation; that his correspondent had enquired from a Mr. *Botham* a merchant in *London,* who informed him that they were in partnership in trade, which information the correspondent communicated to the Plaintiff, who in consequence thereof gave them the goods on the terms they asked.

Mr. *Botham's* clerk was called, and proved, That the only connection in trade between Mr. *Botham* and the defendants was in discounting bills, which Mr. *Botham* had

been in the habit of doing for *Smith* one of the Defendants, but that on discounting a bill at one time for *Smith,* that he had introduced *Lewis* to him as his partner.

Lord Kenyon upon this evidence ruled that it was not sufficient to charge *Lewis* as a partner. His Lordship said, that persons might be partners in a particular concern or business, but that notwithstanding if they did not appear to the world as partners, that it should not be sufficient to constitute a general partnership and make them liable in other cases not connected with such particular business. That the circumstance in evidence of the introduction of *Lewis* to Mr. *Botham* should be taken *secundum subjectam materiam,* that is, as applying to the transaction in which *Smith* was concerned with Mr. *Botham,* the discounting of bills, to which transaction only it should be confined, and that he was therefore of opinion, that without further evidence a general partnership could not be established, in order to charge *Lewis* the other Defendant in this action.

It afterwards, however, appearing in evidence, that in fact *Lewis* had represented himself to the Plaintiff, as partner in trade with *Smith;* his Lordship in his charge to the Jury added, that though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, that both shall be liable.

The Plaintiff recovered.[1]

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[1] *Compare* the report of the earlier case of *Young* v. *Axtell,* in note 1, to *Grace* v. *Smith,* Chapter V, *supra,* in which Lord Mansfield said, that as the defendant had suffered herself to be held out as a partner "she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." See *contra Thompson* v. *First Nat. Bk. infra,* and notes.

GORHAN *v.* THOMPSON.

IN THE COURT OF KING'S BENCH, AT NISI PRIUS, 1791.

1 *Peake's Reports*, 42.

Assumpsit. One of the defendants had suffered judgment by default.

The defendants had been partners about seven years since, and had dissolved the partnership, but no notice of the dissolution had been inserted in the Gazette, nor did the plaintiffs know of it, but thought they were dealing with both defendants. But it appeared that the dissolution was generally known in the neighborhood.

LORD KENYON *said,* to discharge the partner retiring from the partnership there must be a public advertisement in the *Gazette,* or at least the dissolution must be notorious to the public, and actual knowledge of it brought home to the creditor. It would be the hardest measure imaginable upon the creditor were the law otherwise, for while he supposed he was giving credit to a man having sufficient to satisfy the whole of his demand, he might be trusting a beggar.

Verdict for the plaintiff.[1]

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[1] *Compare: Parkin* v. *Carruthers*, 3 Esp. 248, 1801. (A, B *et al.*, were members of a firm, trading as "A, B & Co." B retired, but no notice of this fact was published and no change was made in the firm name. C, who had had no prior dealings with the firm, advanced money to the firm on a promissory note. C brought suit on this note, making A one of the defendants. Le Blanc, J., charged the jury that if C did not know of B's retirement, B was liable).

Goode v. *Harrison*, 5 B. & Ald., 147, 1821. (B, an infant, was in partnership with C. Before becoming 21 he ceased to take any part in the business. He did not, on reaching his majority, give any notice of the dissolution of the firm. *Held*, that on becoming of age B should have given notice of the dissolution of the firm, and that A, who believed B to be a partner, could recover against him as a partner on an obligation arising after B became 21.)

Benjamin v. *Covert*, 47 Wis. 375, 1879. (A and B were partners, trading under the name of A. They dissolved. No notice of the dis-

solution was ever published. C, who had had no previous knowledge of the firm or its business, sold goods to A who had continued the business. C sued B as a partner and offered to prove that at the time he sold the goods A and B had the general reputation of being partners; that he, C, had on inquiry heard of this reputation, and relied on it. *Held* on appeal, that the trial court should have admitted this evidence, not to prove a partnership in fact, but to prove a partnership by holding out.)

The Death of a Partner dissolves the partnership; but no notice of the death is necessary in order to protect the estate of the deceased partner:

Webster v. *Webster*, 3 Swan. 491, note, 1791. (A, the executor of B, brought a bill in chancery against C and D, his co-executors, to restrain them from using the name of B in their business, alleging that the defendants were trying to subject B's estate to the consequences of the trade. Bill dismissed on the ground that there was no danger that B's estate would be subject to liability in this way, and the fraud on the public "is no ground for the plaintiff's coming into this court").

Marlett v. *Jackman*, 3 Allen (Mass.), 287, 1861. (A, B, C and D were in partnership. C died, and the remaining members ceased to do business. D signed a note in the name of the old firm; E was an endorsee. *Held*, that though E might be ignorant of the death of C, and the fact that A, B and D had not continued the business, he could not recover from A and B; that as death operates as a dissolution of itself, "being a public fact all men are bound to know it.")

GRAHAM *v.* HOPE

IN THE COURT OF KING'S BENCH, AT NISI PRIUS, 1792.

1 *Peake's Reports*, 154.

The defendants had been in partnership together, and the plaintiff had sold them goods as partners. Afterwards the partnership was dissolved, and notice of the disolution given in the *London Gazette;* and after this notice, the plaintiff had sold and delivered the goods for which the present action was brought.

The defendants called witnesses, who swore that a notice had been given to the agent of the plaintiff, that the partnership was dissolved. The agent on the contrary positively swore that he had received no such notice.

LORD KENYON told the jury, that the cause depended entirely on the credit they gave to the witnesses on the one side and the other. The *Gazette,* he thought was not *of itself* sufficient notice to the plaintiff of the dissolution of the partnership. His lordship said he did not say this for the purpose of this cause merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never saw a *Gazette* to the day of their deaths, and very mischievous would be the consequences if they were bound by a notice inserted in it. It was incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons with whom they had had dealings in partnership.

The jury, believing the defendants witness, gave a verdict for the defendants.

GODFREY *v.* TURNBULL.

IN THE COURT OF KING'S BENCH, AT NISI PRIUS, 1794.

1 *Espinasse's Reports*, 371.

This was an action by the plaintiff as indorsee of a promissory note, against the Defendant, as the makers of it.

The Defendants had been partners in trade, but the partnership had been dissolved prior to the date of the note. *Macauley*, one of the Defendants, suffered judgment to go by default. The other Defendant relied, that the note was made by the Defendant *Macauley* only, after the dissolution of the partnership, who had put their joint names on it without any authority from him. The note was dated the 6th of *April* 1793. On the 19th of the *March* preceding, notice of the dissolution of the partnership, dated the 15th, had appeared in the *Gazette*. The question was, whether the notice given in the *Gazette* was sufficient, so as to exonerate the Defendant *Turnbull*.

Per LORD KENYON. In general, if a partner gives a note in the partnership name, all the partners are bound by it; and that is the case, even if given after the actual dissolution of the partnership, if that was not sufficiently notified, and the party who took the note, took it on the faith of the partnership name.

A secret dissolution of a partnership cannot discharge the partners; but if the dissolution is notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least to those who have had no previous dealing with the partners, it seems sufficient, at least to be left to the Jury, from thence to infer notice.

In many cases, notice in the *Gazette* is sufficient to subject a party to penalties, as in the cases of smuggling

and outlawries. So in the cases of bankrupts, notice in the *Gazette* is sufficient for every purpose. In the present instance, there is no proof of any actual notice to Mr. *Godfrey* the Plaintiff, but the publication in the *Gazette* is proved, antecedent to his taking the note.

The Jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every *Gazette* of the dissolution of partnerships, which seems to point out that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them.

The Jury found a verdict for the Defendant, *Turnbull.*[1]

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[1] *Compare: Lansing* v. *Gaine,* 2 Johns. 300, 1807. (A and B were partners. They dissolved partnership, and notice was published in the newspapers. A signed a note in the name of B and himself. C obtained a note for value. *Held,* C could not recover from B. Kent, C. J.: "Notice in the newspapers of the dissolution of a partnership is sufficient notice to all persons who have had no previous dealings with the firm." p. 304. Accord: *Mowatt* v. *Hyland,* 3 Day. 353, 1809).

NEWSOME *v.* COLES.

IN THE COURT OF KING'S BENCH, AT NISI PRIUS, 1811.

2 Campbell's Reports, 617.

This was an action against the three defendants as acceptors of a bill of exchange.

Thomas Coles and his three sons, the present defendants formerly carried on business in partnership together, under the firm of *"Thomas Coles and Sons."* The father died in 1805, and the three sons continued to carry on business under the same firm, till the year 1808. *George* and *Charles* then withdrew, and established a new business under a new firm. Notice of the dissolution of partnership was published in the *London Gazette,* and was sent round to the correspondents of the house. *William Coles* continued the old business, by himself, under the old firm; and accepted the bill in question, drawn upon *Messrs. Thomas Cole and Sons.* The plaintiff had not had any dealings with the partnership of *"Thomas Coles and Sons,"* when composed of the three brothers; and when he took the bill in question, he did not know that that partnership had been dissolved.[1]

Lord ELLENBOROUGH.—It is not pretended that the defendants, *George and Charles Cole,* ever interfered with the business carried on by *William* after the dissolution of the partnership, or by any act whatsoever authorized him to use the firm under which they had traded together. I am therefore of opinion that they are not liable for that firm being used by him without their authority. Ample notice had been given of the dissolution of the partnership; and after that, it was the duty of persons taking securities

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[1] The statement of facts as given in the report is abbreviated, and the Reporter's note of the argument of counsel for the plaintiff is omitted.

in the name of *Thomas Coles and Sons,* to enquire who were designated by that firm. The plaintiff might not know of the dissolution; but he had the means of knowing, and the partners who retired could not remain liable for his ignorance. I think they were not bound to apply to the Lord Chancellor for an injunction, or to take any notice of the firm which their brother might happen to use. They were discharged from all liability for his acts by the dissolution of the partnership, and the notice which was communicated of that event. The plaintiff must be called.[2]

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[2] *Compare:* In re *Frazer* (1892) Q. B. 633. (W. and J. Fraser were in partnership under the name of "W. & J. Fraser." They dissolved and published proper notices of dissolution. J. F. permitted W. F. to carry on the business under the name of the dissolved firm. A bank, which had had no dealings with the old firm, discounted a bill drawn by W. F. in the name of the old firm. *Held,* that J. F. was not liable on this bill).

WILLIAMS *v.* KEATS.

In the King's Bench, at Nisi Prius, 1817.

2 Starkie's Reports. 290.

This was an action by the indorsees, against the acceptors of a bill of exchange dated *December* 23d, 1816, drawn by *Ambrose* on the defendants, for the sum of 220*l.* 10*s. payable* to the order of the drawer six months after the date.

The defendant *Keats* had suffered judgment to go by default, and the defence on the part of *Archer* was, that he had ceased to be a partner when the bill was drawn.

It appeared, that the bill although bearing the date of *December* 23d, 1816, had in fact been drawn in the latter end of *February*, 1817, and had been accepted by *Keats*, for the accommodation of *Ambrose*, who knew that the partnership between the defendants had been previously dissolved. *Ambrose* kept it in his possession till *March*, and then negotiated it with the plaintiffs for value. Neither of the defendants had received any value for it. On the 13th of *January*, 1817, it was agreed, that the copartnership between the defendants should be dissolved; and notice was given in the *Gazette* of the 17th of *January*, 1817, announcing that the dissolution had taken place on the 31st *December* preceding. No particular notice of the dissolution of partnership was brought home to the plaintiffs, and it appeared, that the names of *Keats, Archer and Co.* remained over the door of the defendants' shop in the *Poultry*, where they had previously carried on business as hatters till *April* when *Colman's* name was substituted for *Archer's*.

Topping for the defendant *Archer* contended, that he could not be bound by an acceptance of his partner sub-

sequent to the dissolution of the partnership; and he attempted to distinguish this case from those, where former dealings have taken place between the parties; for there he admitted, that it was necessary to shew, that it was necessary to prove notice to the party.

Marryatt contended, that it was incumbent on the defendant *Archer* to prove notice of the dissolution, since whatever might be their private arrangements between themselves, to the world they remained partners, till the name of *Colman* was substituted for that of *Archer*.

Lord Ellenborough was of opinion, that it was necessary that the defendant should bring home some notice to the plaintiffs. He had imprudently suffered notice to be given of the continuance of the partnership, by permitting his name to remain over the door till *April*. Notice in the *Gazette* was not to be considered as notice of the dissolution of partnership to all the world, it was a medium of knowledge, but not equivalent to actual notice.

Verdict for the plaintiffs.[1]

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[1] *Compare: Dolman* v. *Orchard*, 2 Car. & P., 104, 1825. (A, B and C were partners in the business of attorneys. D, an endorsee of a bill of exchange, sued them as acceptors, the bill having been drawn on "A, B & Co." and accepted by A. At the trial C gave evidence to show that he was not a partner at the date of the acceptance. The court left it to the jury to determine whether, if C was not at the date of the acceptance a partner in fact, he had held himself out as such by allowing his name to remain on the office door. Verdict for C.)

Boyd v. *McCann*, 10 Md. 118, 1856. (A and B were partners, trading as "A & B." They dissolved partnership, but B, who continued the business, kept the old firm name over the door. C sued A and B as partners, and asked the court to charge that the existence of the name over the door, "after the publication of the notice of dissolution," would of itself entitle the plaintiff to recover. *Held*, that the court property refused to charge as requested.)

Waite v. *Brewster*, 31 Vt. 516, 1859. W. Brewster and C. Brewster were partners trading under the name of W. & C. Brewster. They dissolved partnership, and notice of the dissolution was published, and the fact became generally known in the place where they did business, but C. B. continued to work in the business as an employee of W. B. and permitted W. B. to carry on the business under the old name. A, a resident of another city who had had no dealings with the firm entered into a contract with W. B. in the old firm name. A had no notice of the dissolution, and during the negotiations saw C. B. working in the store. There was some evidence that C. B. took part in the negotiations with A, acting as if he was a principal. A sued W. B. and C. B.

as partners. The Court charged the jury that if W. B. and C. B. were not partners in fact, that if C. B. was present when the contract was executed without giving A knowledge that he was not a partner, A would have a right to treat him as a partner. The Appellate Court, affirming the judgment in favor of A, said: "The defendant, by continuing to be engaged in the business of the firm after its dissolution, and by allowing his name to be kept upon the sign and used in the transactions of the apparent firm, held himself out to the world as a partner. * * * He thereby took upon himself the consequences of holding out such appearances; and one consequence was, that if a person, ignorant of the fact that he was not a partner, should be misled by the appearances to believe that he was, and to deal with him as such, he would as to such person be a partner.")

DEFORD & CO. *v.* REYNOLDS.

IN THE SUPREME COURT OF PENNSYLVANIA, 1860.

36 Pennsylvania Reports, 325.

Error to the Common Pleas of Franklin County.[1]

STRONG, J.—Some time in the year 1851, Reynolds, the defendant below, entered into partnership with Robert McCulloh, since deceased, under the firm name of R. McCulloh & Co. In the same year, the new firm opened an account with the plaintiffs below, who were leather merchants, doing business in the city of Baltimore, and became indebted to them in a considerable sum. On the 7th of April, 1853, the firm of R. McCulloh & Co. was dissolved by the mutual consent of the partners, and notice of the dissolution was published in the newspapers of Chambersburg, where the firm had principally transacted its business. There is, however, no direct evidence that actual notice of the dissolution was given to the Messrs. Deford, with whom the firm had been dealing. Robert McCulloh continued the business after the retirement of Mr. Reynolds, made payments to the plaintiffs, and purchased from them hides, oil, &c., until December 31st, 1853. He died in April, 1854, and this is a suit against Mr. Reynolds as surviving partner to recover the balance due to the plaintiffs on the 31st of December, 1853.

The first contested question is, whether Reynolds is liable for any portion of the debt contracted after April 7th, 1853, when the firm of R. McCulloh & Co. was dissolved? The solution of this depends upon the answers to be given to two other inquiries; first, whether, in this case, the law required notice to be given to the Messrs. Deford,

[1] The Reporter's statement of the facts and his notes of the argument of counsel are omitted.

in order to secure the retiring partner against liability for debts contracted after his retirement; and secondly, whether, if such notice was necessary, it was in fact given, or, what is equivalent, whether the creditors had knowledge of the dissolution before the debt was contracted?[2]

It is to the first of these minor questions that the earlier part of the argument of the plaintiff in error is addressed, and to this was directed the first point propounded by him to the court below. That point was that, if the jury believed from the evidence that the defendant was not known to the plaintiffs as a member of the firm of R. McCulloh & Co., he might withdraw at any time, without being required to give notice of the dissolution of the partnership, and is only chargeable for debts contracted during the time he was a partner. To this the court replied, that if the jury believed the defendant was an open partner in the firm of R. McCulloh & Co., and that the plaintiffs sold the goods and furnished the stock on the credit of the company, then the liability of the defendant did not cease with the dissoluion, although the plaintiffs may not have known who were the members of the firm.

The rule doubtless is, that an unknown dormant partner may retire from the firm without giving notice of his retirement, and thenceforth be no longer liable for debts which the firm may incur. Having ceased to be a partner in fact, he is not a party to the contract which creates the debt; and, being unknown, he has not encouraged the creditor to rely upon his responsibility. But was Reynolds a dormant partner? And could the court, as matter of law, instruct the jury that he was, if they believed he was not known by the plaintiffs to be a partner? Does the mere fact that one selling goods to a firm is unacquainted with the names of all the persons who compose it, establish that those are dormant partners as to him whose names

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[2] Only as much of the opinion of the Court as relates to the first inquiry is reprinted.

are unknown? It is perhaps not easy to define what constitutes a dormant partner in all cases. The word is sometimes used in opposition to *active,* and, at other times, as contradistinguished from *ostensible* or *known.* This case does not require us to attempt a precise definition. McCulloh and Reynolds were in partnership, it is admitted, until April 7th, 1853. They were the only partners. They transacted business under a firm name that represented to those dealing with them that some other than R. McCulloh was responsible. The vendor of goods, of course, gave credit, not to McCulloh alone, but to him and whatever other persons were embraced within the company. He may not have known the name of the person included under the description "& Co." and yet have known that the partner not named was the most responsible. Indeed, he might have been the active partner, and yet unknown by name to the creditor. Now suppose that the Messrs. Deford had known that there was a partner of Robert McCulloh, an open partner, known as such to the community at Chambersburg. Suppose they had known that he was the active agent in transacting most of the business of the firm, and that he alone was a man of property, but had not been made acquainted with the fact that his partner was Hugh W. Reynolds, can it be said that in selling to the firm, they trusted McCulloh alone, and gave no credit to Reynolds? If not, then the reason given why a dormant partner is not liable after his retirement without notice, is not applicable to this case. Then credit was given to Reynolds under the name "& Co.," and the same reason exists for his continued liability as there is for the liability of any partner who has retired without notice.

In Mitchell *v.* Dale 2 *Harr & Gill* 172, it was said by MARTIN, J., that every partner is dormant, unless his name appear in the firm *"or is embraced under general terms, as the name of one of the firm and company."* Without assenting to this as universally true, it may be said, that

its obvious implication is, that if one is embraced in the general description, the name of one partner and company, his is not a case of dormant or secret partnership. Collyer, in his treatise, sect. 4, defines a dormant partner to be one "whose name and transactions as a partner are professedly concealed from the world." The only object which such an one can have in remaining dormant or secret, is, that credit may be given to the ostensible partners alone, and not to him. With such a purpose or object, doing business under the name of one partner *and company*, is inconsistent. It can be nothing less than an invitation to the public to give credit to more than the single partner named. Entertaining such views, we are of opinion that there was no error in the answer of the court below to the defendant's first point. Whether he was a dormant partner or not was a question for the jury, and, trading as he did under the firm name of R. McCulloh & Co., the solitary fact that he was not known by the plaintiffs to be the company, was not sufficient to enable the court to say that his liability ceased at the dissolution of the firm, without notice to those who had dealt with it. If he was an open partner, and the credit was given to the company, he was still bound.

Judgment for the plaintiff affirmed.[3]

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[3] *Compare: Poillon* v. *Secor*, 61 N. Y. 456, 1875. (A, B and C were in partnership, trading as "A, B & Co." A retired from the firm, but allowed B and C to continue the business under the old name and use his name as a member of the firm. The new firm purchased goods from D, and D sued A, B and C as partners. *Held*, that in order to hold A as a partner it was not necessary for him to show that he knew who A was, or that he gave credit because of his apparent connection with the firm. *Query*, whether if D had known that A for a consideration had allowed himself to be held out as partner, D would have recovered?)

Shamburg v. *Ruggles*, 83 Pa. 148, 1876. (A, B, C *et al.* were in partnership, trading as "The Citizens' Bank." B's name appeared as one of the directors of the bank. S was a depositor. B retired from the firm, but he gave no notice of this retirement to S., and his name was continued as one of the directors, though he requested that it be withdrawn. *Held*, that B was liable to S for money deposited after his withdrawal, though S admitted that he did not inquire and did not know who the partners were. Accord: *Howell* v. *Adams*, 68 N. Y. 314, 1877.)

McGowan v. *American Tan Bark Co.*, 121 U. S. 575, 1887. (A, B,

et al. were partners. D had business with them. They made a contract with D. D sued on the contract. The defendants claimed that before the contract they had formed a corporation and assigned all the property of the firm to the corporation, and that the contract was made by the corporation. The Court charged that D could recover against the defendants as partners unless he had notice of the creation of the corporation at the time he entered into the contract.)

The Elmira Iron and Steel Rolling Mill Co. v. *Harris,* 124 N. Y. 280, 1891. (A, C and B entered into an agreement by which they were to form a partnership under the name of "A & Co." A and C were the active members, B to act as a consulting member. There was no agreement that B's connection with the firm was to be kept secret, and A mentioned it to others, but not to D who dealt with the firm. B retired, and notice of his retirement was published. D, still ignorant of the existence of B, made a contract with the firm. *Held,* that D could hold B on this contract as a partner. Haight, C. J., dissented on the ground that B was a dormant partner, and as such notice of his retirement was not necessary.)

See further the discussion in *Strecker* v. *Conn,* 90 Ind. 469, 1883, pp. 470, 471.

SMITH *v.* HILL.

In the Supreme Court of Vermont, 1872.

45 *Vermont Reports*, 90.

Assumpsit upon a promissory note, signed "L. D. Hill & Co. by F. C. Harrington," and also by Francis Richardson. Plea, the general issue, and trial by the court, June term, 1872, Ross J., presiding.

There never existed any such firm as L. D. Hill & Co. None of the defendants were ever in company with each other in any kind of business. Two or three years before said note was given, a man in Island Pond notified the defendant Hill, that Harrington was using the name of L. D. Hill & Co. in his staging business. Hill afterwards saw Harrington, and told him he must not use that name to injure him, and Harrington said he would not. Hill knew nothing of the giving of said note till about the time this suit was commenced. It did not appear that the plaintiff knew of the previous use of Hill's name by Harrington in his staging business; nor did it appear whether Harrington made any representations to the plaintiff at the time he signed the note. At that time he gave the plaintiff's notes to the amount of $1600 for the purchase of some staging property, and paid them himself, except the balance due on the note in question. Hill was never called upon to pay anything on paper thus signed, until this suit was brought. There was no service on Richardson, and Harrington made no defense. Judgment for the defendant Hill, and against the defendant Harrington. To the rendition of judgment for Hill, the plaintiff excepted.[1]

Peck, J. If one suffers another to hold him out as a partner, or to use his name in business as such, he is liable as a partner on a contract thus made, although in fact

[1] The Reporter's notes of the cases cited by counsel are omitted.

he has no interest in the business of such partnership. When the defendant Hill was informed that Harrington, in his staging business, was using his name, under the name of L. D. Hill & Co., it does not appear that he forbid it, but that he afterwards saw Harrington and told him he must not use that name to hurt him, and that Harrington replied that he would not. The fair import of this is, that Hill acquiesced in such use of his name, on Harrington's assurance that he would not thereby injure him or, in other words that he would not thus use his name beyond his ability to indemnify him, and that he would save him harmless. The risk of Harrington's neglect to redeem this pledge was upon Hill, and not upon those to whom Harrington should, in his staging business, thus pledge the credit of Hill. It makes no difference that Hill knew nothing of the giving of the note in question till about the time of the commencement of the suit. It is urged by the defendant's counsel, apparently with great confidence, that as it did not appear that the plaintiff ever knew of the previous use of the defendant Hill's name by Harrington in his staging business, nor what representations, if any, Harrington made to Smith, the plaintiff, at the time he executed the note by the name of L. D. Hill & Co., the defendant Hill cannot be held liable. This would be material, if the signature did not disclose the name of Hill; as it might then be urged that the plaintiff did not take the note relying on the credit of Hill. But as the name of the defendant Hill appears specifically upon the face of the note as one of the makers, the case is quite different, since the legal intendment is, that the payee takes a note upon the faith of the persons whose names appear upon it as makers. The common practice of this court is, in cases tried by the court when the facts are found by the county court, if the judgment of the county court is reversed, to proceed and render final judgment, such as the facts warrant; but in this case we conclude to reverse the judgment, and grant a new trial.

Judgment reversed and new trial granted.

THOMPSON *v.* FIRST NATIONAL BANK OF TOLEDO.

IN THE SUPREME COURT OF THE UNITED STATES, 1884.

111 *United States Reports*, 529.

Action by the First National Bank of Toledo, against certain persons, including one Edward R. Thompson, as partners upon a draft for $5000, drawn and accepted by the partnership. Thompson filed a separate answer denying that he was a member of the partnership or liable to the plaintiff on the draft sued on. There was a general verdict for the plaintiff. The defendants, after duly excepting to the refusal of the Court to give, as requested, the instructions set forth in the following opinion, sued out this writ of error.[1]

Mr. Justice Gray delivered the opinion of the Court.

The plaintiff at the trial sought to charge Thompson with liability as a partner upon two grounds: First, that he was actually a partner. Second, that if not actually a partner he had held himself out to the world as such. And the case was submitted to the jury upon both grounds.

The first and second assignments of error relate to the exclusion of evidence offered by the defendants bearing upon the first ground of action. The third and fourth assignments of error relate to the instructions given and refused as to the second ground of action.[2]

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The remaining and the principal question in the case is, whether the liability of Thompson, by reason of having held

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[1] The facts are partially restated. The essential facts are given in the opinion.

[2] Only so much of the opinion as relates to the third and fourth assignments of error is reprinted.

himself out as a partner, was submitted to the jury under proper instructions.

The court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transactions with the partnership. The court declined to give this instruction; and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out, and did not rely on him for the payment of the plaintiff's debt, or give credit to him, in whole or in part.

This court is of opinion that the Circuit Court erred in the instructions to the jury, and in the refusal to give the instruction requested.

A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is, that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted, or

permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership.

There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel in pais, a question of fact for the jury, and not of law for the court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same, that one who had no knowledge or belief that the defendant was held out as a partner and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact.

The whole foundation of the theory that a person who, not being in fact a partner, has held himself out as a partner, may be held liable as such to a creditor of the partnership who had no knowledge of the holding out, and who never gave credit to him or to the partnership by reason of supposing him to be a member of it, is a statement attributed to Lord Mansfield in a note of trial before him at *nisi prius* in 1784 as cited by counsel in a case in which it was sought to charge as a partner one who had shared in the profits of a partnership. By so much of that note as was thus cited, which is the only report of the case that has come down to us, it would appear that in an action by Young, a coal merchant, against Mrs. Axtell and another person, to recover for coals sold and delivered, the plaintiff introduced evidence that Mrs. Axtell had lately carried on the coal trade, and that the other defendant did the same under an agreement

between them, by which she was to bring what customers she could into the business, and the other defendant was to pay her an annuity, and also two shillings for every chaldron that should be sold to those persons who had been her customers or were of her recommending; and that bills were made out in their joint names for goods sold to her customers; and that the jury found a verdict against Mrs. Axtell, after being instructed by Lord Mansfield that "he should have rather thought, on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing know that she was a partner, or that her name was used." *Young* v. *Axtell,* at Guildhall Sittings after Hilary Term, 24 Geo. III., cited in *Waugh* v. *Carver,* 2 H. Bl. 235, 242. But as the case was not there cited upon the question of liability by being held out as a partner, it is by no means certain that we have a full and accurate report of what was said by Lord Mansfield upon that question; still less that he intended to lay down a general rule, including cases in which one, who in fact had never taken any part in or received any profits from the business, held himself out as a partner.

In delivering the judgment of the Common Bench in *Waugh* v. *Carver,* Chief Justice Eyre said: "Now a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labor nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or

four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." 2 H. Bl. 246.

This statement clearly shows that the reason and object of the rule by which one who, having no interest in the partnership, holds himself out as a partner, is held liable as such, are to prevent frauds upon those who lend their money upon the apparent credit of all who are held out as partners; and the later English authorities uniformly restrict accordingly the effect of such holding out.

In *McIver* v. *Humble,* in the King's Bench in 1812, Lord Ellenborough said: "A person may make himself liable as a partner with others in two ways: either by a participation in the loss or profits; or in respect of his holding himself out to the world as such, so as to induce others to give a credit on that assurance." And Mr. Justice Bayley said: "To make Humble liable, he must either have been a partner in fact in the loss and profit of the ship, or he must have held himself out to be such. Now here he was not in fact a partner, and the goods were not furnished upon his credit, but upon the credit of Holland and Williams." 16 East, 169, 174, 176.

In *Dickinson* v. *Valpy*, in the same court in 1829, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) said: "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement." 10 B. & C. 128, 140. And see *Carter* v. *Whalley,* 1 B. & A. 11.

In *Ford* v. *Whitmarsh,* in the Court of Exchequer in 1840, a direction given by Baron Parke to the jury in substantially the same terms was held by Lord Abinger, Baron Parke, Baron Gurney and Baron Rolfe (afterward Lord Cranworth) to be a sound and proper direction; and Baron Parke, in explaining his ruling at the trial, said: "I told the jury that the defendant would be liable if the debt was contracted whilst he was actually a partner, or upon a representation of himself as a partner to the plaintiff, or upon such a public representation of himself in that character as to lead the jury to conclude that the plaintiff, knowing of that representation, and believing the defendant to be a partner, gave him credit under that belief." Hurlstone & Walmsley, 53, 55.

In *Pott* v. *Eyton,* in the Common Bench in 1846, which was an action by bankers to recover a balance of account against Eyton and Jones, on the ground that either they were actual partners in the business carried on by Jones, or Eyton had by his own permission been held out as a partner, Chief Justice Tindal, delivering the judgment of the court, said: "There was no evidence to show that credit was in fact given to Eyton, or that the bankers knew that his name was over the door of the shop at Mostyn Quay, or that they supposed him to be a partner. One person who had been manager, and another who had been a clerk in the bank, were in court; and if they could have given such evidence, they would no doubt have been called as witnesses. We must assume, therefore, that credit was given to Jones alone; and, if Eyton is to be made liable, that must be on the ground of an actual partnership between himself and Jones." 3 C. B. 32, 39. In *Martyn* v. *Gray,* in the same court in 1863, Chief Justice Earle and Mr. Justice Willes expressed similar opinions. 14 C. B. (N. S.) 824, 839, 843. The decision of the Court of Exchequer in *Edmundson* v. *Thompson,* in 1861, is to the like effect. 31 Law Journal (N. S.) Ex. 207; *S. C.* 8 Jurist. (N. S.) 235.

Mr. Justice Lindley, in his Treatise on the Law of

Partnership, sums up the law on this point as follows: "The doctrine that a person holding himself out as a partner and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct." "The expression in *Waugh* v. *Carver,* 'if he will lend his name as a partner he becomes as against all the rest of the world a partner,' requires qualification; for the real ground on which liability is incurred by holding oneself out as a partner is, that credit has been thereby obtained. This was put with great clearness by Mr. Justice Parke in *Dickinson* v. *Valpy.*" "No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: first, the alleged act of holding out must have been done either by him or by his consent, and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled." Lindley on Partnership (1st ed.) 45-47; (4th ed.) 48-50.

The current of authority in this country is in the same direction. *Benedict* v. *Davis,* 2 McLean, 347; *Hicks* v. *Cram,* 17 Vermont, 449; *Fitch* v. *Harrington,* 13 Gray, 469; *Wood* v. *Pennell,* 51 Maine, 52; *Sherrod* v. *Langdon,* 21 Iowa, 518; *Kirk* v. *Hartman,* 63 Penn. St. 97; *Hefner* v. *Palmer,* 67. Illinois, 161; *Cook* v. *Penrhyn Slate Co.,* 36 Ohio St. 135; *Uhl* v. *Harvey,* 78 Indiana, 26. The only American case, cited at the bar, which tends to support the ruling below, is the decision of the Commission of Appeals in *Poillon* v. *Secor,* 61 N. Y. 456. And the judgment of the Court of Appeals in the later case of *Central City Savings Bank* v. *Walker,* 66 N. Y. 424, clearly implies that in the opinion of that court a person not in fact a partner cannot be made liable to third persons on the ground of having

been held out as a partner, except upon the principle of equitable estoppel, that he authorized himself to be so held out, and that the plaintiffs gave credit to him.

The result is that, both upon principle and upon authority, the third and fourth assignments of error, as well as the first, must be sustained, the judgment of the Circuit Court reversed, and the case remanded to that court with directions to order a *New trial.*[3]

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[3] *Compare: Vice* v. *Anson,* 7 B. & C., 409, 1827. (A, having paid certain moneys, received notice that she was a partner in a mine. She believed herself a partner, and spoke of herself to others as such. B gave credit to the partnership, but without any knowledge of the existence of A. *Held,* that A was not liable to B.)

Denithorne v. *Hook,* 112 Pa. 240, 1886. (A and B were in partnership. They desired to enter into a contract to construct a reservoir for C. D agreed to go on the contractor's bond. E, who drew the contract, thought that the firm consisted of A and D; and the agreement was worded as a contract between A and D, and C. D signed the contract, it having been explained to him that his doing so would in effect make him a surety, as he had agreed. F furnished supplies to A and B in the course of their prosecution of the work. Not being paid, he brought suit against A and D as partners, and offered the above recited contract as evidence of the partnership. *Held,* that the evidence was improperly admitted, because it was not sufficient evidence of a partnership in fact, and not being accompanied by an offer to show that the plaintiff knew of it at the time the debt was created, it could not be used to fasten any liability on the defendants.)

Hahlo v. *Mayer,* 102 Mo. 93, 1890. (A carried on business under his own name. He changed the name under which he carried on business to "A & Son." The son was not in the business. The son signed "A & Son" to accommodation paper which came into the hands of B, a bona fide holder for value. A had never represented to B that his, B's, son was a partner. The Court below instructed the jury that, though B was ignorant of the fact that A held out his son as a partner, nevertheless B could recover from A. *Held,* that the instruction was erroneous, and a new trial was granted. Barclay, J., dissented.)

SMITH *v.* BAILEY.

In the Court of Appeals, England, 1891.

Law Reports [1891], *2 Queen's Bench,* 403.

Action in respect of personal injuries occasioned to the female plaintiff by the negligent management of a traction engine upon a highway.

The defendant, who was the owner of a traction engine, to which his name and address were affixed, as required by the Locomotives Act, 1865, s. 7, let the same for three months. Through the negligent management of the engine whilst it was being used upon a highway by the hirer, personal injuries were occasioned to the plaintiff, who was being driven in a carriage upon the highway.

Verdict for the defendant. The plaintiffs applied for a new trial.[1]

Lord Esher, M. R. (after dealing with the question whether the verdict of the jury on the question of fact was against evidence, and holding that it was not, his Lordship proceeded as follows:—) The case of *Stables* v. *Eley* (1 C. & P. 614) was then cited on behalf of the plaintiffs as authority for the proposition that, if a man allows a carriage to go out with his name upon it, he holds himself out as liable for injury occasioned by the negligence of any person driving it; and, according to the language used in the report, the decision does seem to go to the length of holding that in such a case there would be conclusive evidence of liability. But, if so, I think the decision was wrong, and I cannot agree with it. The case is mentioned in various text-books; but the comment upon it always appears to be that, if it is to be taken to go that length, it must be wrong, and it has been suggested that the utmost effect that could be given to the deci-

[1] The facts are restated.

sion is that under such circumstances there would be prima facie evidence of liability, which might be met, however, by shewing the truth of the matter. If the decision is to be taken as going any further than that, as I have said, I think it is wrong. If it really only went that length, it is not necessary upon the present occasion to say whether it is wrong or not.[2]

Bowen, L. J. I am of the same opinion. I only wish to say that in my judgment the decision in *Stables* v. *Eley* (1. C. & P. 614) can only be justified on the supposition that the case had been misreported. The only possible explanation of the decision seems to be that suggested by the Master of the Rolls. It appears to me that the sooner the case disappears from the text-books the better.

Application refused.

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[2] That part of the opinion which deals with the Locomotive Act of 1865 is omitted.

SECTION 2. — WHEN A CREDITOR LOSES HIS RIGHT TO PROCEED AGAINST THE PERSON HELD OUT AS PARTNER.

SCARF *v.* JARDINE.

IN THE HOUSE OF LORDS, 1882.

Law Reports, 7 Appeal Cases, 345.

Appeal from a judgment of the Court of Appeal, reversing a judgment in favor of the defendant given by Denman J.[1]

LORD SELBORNE, L.C.:—My Lords, the facts in this case are few and simple, but they raise a question which may be of some general importance and which seems from what has been stated at the Bar, to be as yet undetermined by authority.

There was a firm carrying on business, under the name of W. H. Rogers & Co., in Manchester, with which the plaintiff, Mr. Jardine, had dealings. It consisted at first of two partners, the defendant, Mr. Scarf, and Mr. W. H. Rogers. On the 27th of July, 1877 those two persons dissolved the partnership between them, and another person, named Beech, joined Mr. Rogers, and they carried on the same business, under the same name and at the same place, from that time forward. Of this the Plaintiff, Mr. Jardine, knew nothing until the 25th of February, 1878. In the meantime, in January, 1878, goods were ordered from him on behalf of the firm carrying on business under the name of W. H. Rogers & Co., according to the ordinary course of business—which I presume was the same as had prevailed before the dissolution of partnership in the previous month

[1] The statement of facts and notes of the arguments of counsel printed in the Report are omitted.

of July—goods were ordered of the plaintiff, and were delivered by him in February, 1878, at the place of business of the firm. At the time when they were ordered, and at the time when they were delivered, he was ignorant of the dissolution of partnership which had in fact taken place, and of the fact that the business was then being carried on not by Mr. Scarf and Mr. Rogers but by Mr. Rogers and Mr. Beech. He became aware of those facts upon the 25th of February, 1878, on receiving a circular dated on the 21st of the same month of February, by which notice was given to him, and by which the date of the dissolution of partnership was mentioned as having taken place on the 27th of July, 1877; and it was at the same time stated that all debts owing to or by the old firm would be received and paid by Mr. Rogers alone, who would continue to carry on the business as theretofore, in partnership with Mr. Beech, under the same style and firm.

The plaintiff afterwards supplied other goods to the new firm. He made no break in the account in his books. He rendered an account consisting of the old and new debts —by "the old" I mean the debt which had been incurred before he became aware of the dissolution of partnership: by "the new" I mean that which had been incurred afterwards —he rendered that account to the new firm. He had some correspondence with them, looking to them as the persons from whom he might expect payment of the whole of that demand; and they on the other hand replied in the correspondence as being prepared to liquidate the debt; they made some payment on account, and they gave a cheque for the balance on the 22nd of July, 1878, which was post-dated a week. That cheque when presented was dishonoured; and on the 7th of August, 1878, the plaintiff commenced an action against Rogers and Beech for the balance, which included the present demand, that is to say included the demand for the goods which had been ordered in January and supplied in February before notice of the dissolution of partnership.

That action was stopped, not by any discontinuance on the plaintiff's part, but by the failure of the new firm, which went into liquidation on the 16th of August, 1878. Under this liquidation the plaintiff proved as a creditor of the new firm, by an affidavit in which he swore that Rogers and Beech were justly and truly indebted to him in the sum of £125, 19*s.* 1*d.* for goods sold and delivered by him to Rogers and Beech, that sum including the goods in question.

Your Lordships, I think, must take it upon the facts as they appear that no objection was made to that proof; that it was never retracted; that it was admitted: and although it does not appear upon the proceedings that a dividend has been paid under it, yet at all events, for anything that your Lordships know to the contrary, that may be the case, or may be the case hereafter.

Now after the liquidation and after the proof the present action was brought by the plaintiff against Mr. Scarf, who in point of fact had ceased to be a partner in July, 1877, who in point of fact had given no authority to order the goods in question upon his credit, and who as between himself and the persons who did order the goods was at the time when they were supplied a stranger to the business. On the other hand, the persons who actually ordered those goods and to whom they were supplied were Rogers and Beech. They were the persons alone interested in the business, and they were undoubtedly, upon ordinary principles, liable for what they so ordered. The defendant also might be held liable—about that there can be no doubt; because the principle of law, which is stated in Lindley on Partnership (Vol. i. p. 429, 3rd Ed.) is incontrovertible, namely that "when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred;" and the principle on which they are entitled to assume it is that of the estoppel of a person who

has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation. Of course in partnership there is agency—one partner is agent for another; and in the case of those who under the direction of the partners for the time being carry on the business according to the ordinary course, where a man has established such an agency and has held it out to others, they have a right to assume that it continues until they have notice to the contrary.

There was therefore in this case undoubtedly a state of circumstances which would have entitled the plaintiff, if he had thought fit, to hold Mr. Scarf liable, the credit being given to him and to Rogers, there being no knowledge on the part of the plaintiff of the dissolution of partnership; no knowledge of any revocation of the agency at the time when these goods were delivered. On the other hand, if you look not to the estoppel but to the fact, the plaintiff was entitled to hold the persons who actually gave the order and received the goods, and were interested in the profit and loss of the firm which ordered them, liable to him; those persons being not Scarf, Rogers, and Beech, or Scarf and Rogers, but Rogers and Beech alone.

Now it appears to me that the real question which your Lordships have to determine is not as it was treated in the Court below—in I think both the Courts below—namely, the question of what is called "novation;" but it is this, whether in that state of circumstances there was a concurrent joint liability of the three persons, Scarf, Rogers and Beech, upon the principles which I have stated; or whether the plaintiff had a right to make his choice whether he would sue those who were liable by estoppel, or sue those who were liable upon the facts. Put it as I can I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together; you cannot at once rely upon

estoppel and set up the facts, and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combination of the two can possibly make A, B and C all liable jointly.

Therefore it appears to me that if the plaintiff chose to go upon the facts and to make the persons who actually ordered and got the benefit of the goods his debtors (which he had a plain and certain right to do), he entirely disavowed the estoppel and could no longer set it up. If on the other hand he choose to go upon the estoppel, then Beech being a stranger to the liability upon that footing, he could only sue Scarf and Rogers. One way of testing it would be by inquiring what was the rule under the old system of pleading. If at that time Scarf and Rogers had been sued, could they have pleaded in abatement that Beech ought also to be joined as being also liable? I think most clearly they could not. And upon the other hand if Rogers and Beech had been sued, still more impossible would it have been for them to plead in abatement that Scarf ought also to be joined, for he was neither a partner when the goods were ordered, nor as between him and themselves could any liability possibly have attached to him.

It seems to me therefore that the plaintiff was necessarily put to his election. He might hold either Rogers and Scarf, or Rogers and Beech liable; he could not hold Rogers, Scarf, and Beech all liable together.

[The Lord Chancellor, coming to the conclusion that the plaintiff had elected to hold Rogers and Beech, moved that the order under appeal be reversed, and that the appellant "have his costs in the Court of Appeal and in this House."]

Lord Blackburn:

And then comes the question which ought to have been decided, not whether there was a novation (upon which if probably if I had thought that that was the question I should have agreed with the majority of the Court of Appeal) but

whether the Plaintiff had before the 30th of September, the date at which he for the first time made a claim against Scarf, made a final determination of the election by which he had to choose which of the two sets of parties he would hold liable.[2]

Now on that question there are a great many cases; they are collected in the notes to *Dumpor's Case* (1 Sm. L. C. 8th ed. 47, 54.) and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. "Quod semel placuit in electionibus, amplius displicere non potest." That is Coke upon Littleton (146 a), and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made.

But upon that comes the question which is the one that now arises, whether there was evidence here on which your Lordships should find as a fact that there was an election. In *Clough* v. *London and North Western Railway Co.,* (Law Rep. 7 Ex. 34.) the Exchequer Chamber had to consider that question a good deal in a case of some importance in which the subject was carefully considered. I wrote it myself and I say nothing further about it than this, that it had the full assent of all the other Judges. The result of what is there said is that where there is a right to elect the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons, and accordingly in that particular case it was held that he had not lost his right to

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[2] Only so much of his opinion as relates to whether the plaintiff, before attempting to hold Rogers and Scarf, had elected to hold Rogers and Beech, is reprinted. The learned Lord agreed with the Lord Chancellor, that the plaintiff was put to his election, and could not sue all three as partners.

elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final.

I may also refer to the case of *Jones* v. *Carter* (15 M. & W. 718) as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. In *Jones* v. *Carter* (15 M. & W. 718) (the principle is general though the particular application is peculiar) the question was whether a man who had a right to avoid a lease had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which in modern times you do not actually enter; but it had proceeded so far that the defendant had entered into a consent rule; and the defendant having entered into a consent rule by which he had admitted the entry, the Court held that it must be taken as if the plaintiff had entered, and that inasmuch as the entry to avoid a lease was unequivocal in its nature he could not afterwards say "The lease was not void."

Now that is the question which I think the Court below ought to have decided and which I think your Lordships now, having power to find all the facts, have to decide upon the evidence. Was there, before the 30th of September, which was the date when the plaintiff first came upon Scarf, an unequivocal election to take Beech as his debtor? I do

not think that at first there was. I do not think that the mere fact of his having continued to enter in his books these goods along with others which he had undoubtedly contracted to supply after the 25th of February, when he had full notice (entering them in one account), would preclude him; because I think as I said before, that it was merely an expression of his own private intention and opinion, which did not bind the matter until it was communicated to the other side, which it never was. I do not think that his having demanded money from Rogers after he knew that Rogers was carrying on the new firm of Rogers & Beech will do, for the reasons given by Brett L.J., that the notice of dissolution distinctly said "Whatever Rogers & Scarf owe, go to Rogers, and Rogers will pay it." But then the evidence goes further. I am not sure that taking a cheque from Rogers & Beech as payment was enough to make an election, because I think that in acting on the authority given by Scarf to Rogers to pay the debts for him and Scarf, Rogers might pay money by the new firm's cheque or otherwise as he pleased. But then the plaintiff goes on and issues a writ against Rogers & Beech—he sues Beech. I am unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers & Beech I cannot imagine. The result of his issuing the writ was that Rogers & Beech not being able to get time to obtain terms went into liquidation, and then the plaintiff sent in his affidavit claiming to prove against Rogers & Beech for this sum which is now in dispute, and also for the subsequent debts treating them all as one. I think that also is an unequivocal act. And taking the whole together I can bring myself in no way to doubt, that upon the facts we ought to find that Mr. Jardine having the right of election between holding Beech liable and holding Scarf liable, had, before he ever came upon Scarf, finally deter-

mined his election and taken Beech as liable, and that he could not hold both Scarf and Beech liable.

I am consequently of opinion that the judgment should be for the defendant, though not upon the ground on which it was originally put, namely that there was a novation, but upon the ground that Scarf never was liable, for this reason, that before any step was taken to make him liable, a final and conclusive election had been made to hold Beech liable, which involved impliedly that Scarf was not.[3]

Order appealed from reversed.

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[3] The opinions of Lords Watson and Bramwell in agreement with those reprinted are omitted.

CHAPTER VII.

LIMITED PARTNERSHIP.

AMES *v.* DOWNING.

IN THE SURROGATE'S COURT OF NEW YORK, 1850.

1 Bradford's New York Surrogate's Reports, 321.

The Surrogate [Alexander W. Bradford]: The testator, at the time of his decease, was a special partner of Mr. Hicks, the executor, in business in this city; and the position has been taken by the counsel for the executors, that the firm was not dissolved, but notwithstanding the testator's decease, continued till the expiration of the term limited for its duration.[1]

The idea at first impression is apt to win attention if not favor, but on closer scrutiny cannot, I think, be upheld. The legislation which brought into existence among us this form of partnership, had for its main object the encouragement of commerce by permitting the investment of capital in trade, without danger to the public, or risk to the special partner beyond the extent of the amount invested; and in determining the legal consequences incidental to the introduction of such an institution, there seems to me no reason for departing from the rules of the Common Law, any further than is fairly and naturally requisite to give full effect to the intent of the statute; resting upon the presumption that the Legislature having expressed the points in which the Common Law was intended to be abrogated, that line should not by judicial construction be extended, except by way of reasonable and necessary inference to effectuate the general objects of the statute. The special partnership is by no means a complete anomaly. By the statute it is termed

[1] Only so much of the opinion as relates to this question is reprinted.

a *partnership,* and both as to the rights of the parties to the contract, and as to the world, it is in itself a proper partnership, except as it limits the liability of the special partner, and restricts his control over the business of the firm. The members are *partners,* and by slight irregularities may easily be turned into general partners. The statute terms them *partners;* except for the statute they would be general partners, and from participating in the profits, it would seem to be a just consequence that they are partners in every sense, subject to liabilities and enjoying privileges as partners in every particular, except as otherwise specially provided. The Common Law regulates the mutual rights, and duties, and liabilities of partners, and governs these limited partnerships, in every respect not excepted out of the general rule by this statute. The 12th Section provides that every alteration which shall be made in the names of the partners shall be deemed a dissolution of the partnership, and the necessary effect of an assignment by a special partner, of his interest in the firm, would be to alter the name of the special partner, and thus to work a dissolution. Such would likewise seem to be the consequence of the death of the special partner, which effects an alteration in the name, by operation of law, through the medium of an administrator. The 18th Section declares also, that the general partners shall be liable to account to each other and to the special partners in law and equity as other partners now are by law; and the 24th Section provides, that no dissolution by the acts of the parties shall take place previous to the time specified for the duration of the partnership, without public notice. There appears to be nothing in the act incongruous with the idea, that the partnership is governed by the rules applicable to general partnerships, except in the particular cases enumerated. There is nothing irreconcilable with the dissolution of the partnership by operation of law in the usual cases. I have looked into the statutes of several of the States, where similar laws have been enacted, and while they all imply

that a dissolution may occur by operation of law, those of Massachusetts, Michigan, Rhode Island and Virginia, expressly admit of that mode of dissolution. The Code of Louisiana declares, that all partnerships shall terminate with the death of one of the partners, and quite a number of these acts prescribe, that in cases not provided for, the law relating to general partnerships shall govern. (*Rev. St. Mass.*, 306; *Louisiana Code*, 2799, 2810, 2851; *Rev. St. Maine*, 264; *Laws Mississippi*, 839; *Rev. St. Michig.*, 156; *R. S. N. J.*, 872; *Laws Penn.*, 620; *Laws R. I.*, 282; *Virginia Code*, 583; *Laws Connecticut*, 528; *Laws Indiana*, 429; *Code of Georgia*, 373.) Now if any other principle is admitted, what is the result? If the death of the special partner does not cause a dissolution, shall that of the general partner have that effect? If the death of the special partner does not dissolve the firm, shall his executor or administrator be the partner? If so, does not that introduce a new name into the firm? And if it does, then the executor or administrator becomes a general partner, and if a general partner, then he can dissolve the firm (*2 R. S., 3d ed.*, § 12, *p.* 50), or on the other hand, the estate he represents may be thrown into the hazards of a general partnership, and the executor or administrator have to attend personally to the transaction of a regular partnership business. The above statement of some of the embarrassing results which would flow from this novel proposition, should induce hesitation and caution in admitting it.

No doctrine is more universally established, than that by the death of any one of the partners the partnership is *ipso facto* dissolved; and this not only as to the deceased partner, but also as between all the survivors, and, however numerous the association may be. The reasoning upon which this result is attained, as well as the rule itself, is amply illustrated by the Civilians, the doctrine having its foundation in the Civil Law, though it has been recognized and adopted, to its fullest extent, by the Common Law. The personal qualities, skill, character, and credit

of each partner enter so thoroughly into every contract of this kind, that the law very wisely considers it a personal contract, expiring with death. Though these reasons are not so apposite to a special as to a general copartnership, yet they are measurably applicable. It is true that a special partner has no control over the business of the firm, and contributes as a matter of duty, no portion of his time, labor, or abilities, towards the management of its affairs, but he may from time to time examine into the state and progress of the partnership concerns, and advise as to their management. This brings him into the most intimate relations with the general partner; and, in view of his right to give advice, it is evident the general partner may perhaps have built up well-founded hopes of a successful and thriving trade, upon the experience, wisdom, and abilities of his associate, expectations sure to be destroyed by death. How often is it the case that a successful merchant, retiring from the cares of active business, enters into a partnership of this kind, where his knowledge and sagacity, and his influence, are important inducements with the general partner to enter into the contract. Does a limited partnership survive the death of the special partner? Then it is compulsory on the survivor to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, a creditor or stranger taking administration, or the assignee of such personal representatives; and whatever may be the inconvenience and hardship of being thus thrown, against his will, into connection with a stranger, or perchance with some one personally disagreeable, or hostile, the general partner must submit to the examination of the books, the visits, and the advice of the incomer. (*Gow on Part.*, § 3, *p.* 220; *Collyer, 3d Am. ed., p.* 99.) The joint stock companies, many of which exist in England, often comprise a large number of persons, and though generally managed by officers chosen at elections held by the stockholders, they are liable to the application of the same rules of law

in regard to death and dissolution, as general partnerships, unless provision be made to meet the case, in the deed of settlement, or articles of agreement. (*Collyer,* §§ 1112, 1113, 1115.)

The system of limited partnerships, which was introduced by statute into this State, and subsequently very generally adopted in many other States of the Union, was borrowed from the French Code. (3 *Kent,* 36; *Code de Commerce,* 19, 23, 24.) Under the name of *la Société en commandite,* it has existed in France from the time of the middle ages; mention being made of it in the most ancient commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar Latinity of the middle ages it was styled *commenda,* and in Italy *accomenda.* In the statutes of Pisa and Florence, it is recognized so far back as the year 1160; also in the ordinance of Louis-le-Hutin, of 1315; the statutes of Marseilles, 1253; of Geneva, of 1588. In the middle ages it was one of the most frequent combinations of trade, and was the basis of the active and widely-extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean, was known in Languedoc, Provence, and Lombardy, entered into most of the industrial occupations and pursuits of the age, and even travelled under the protection of the arms of the Crusaders to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaping the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading classes, and brought the Commons into position as an influ-

ential estate of the commonwealth. Independent of the interest naturally attaching to the history of a mercantile contract, of such ancient origin, but so recently introduced where the general partnership, known to the Common Law, has hitherto existed alone, I have been led to refer to the facts just stated, for the purpose of showing that the special partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood, and regulated. Ducange defines it to be, "SOCIETAS MERCATORUM *qua uni sociorum tota negotiationis cura commendatur, certis conditionibus.*" It was always considered a proper partnership, *societas,* with certain reserves and restrictions; and in the ordinance of Louis XIV., of 1673, it is ranked as a regular partnership. In the Code of Commerce it is classed in the same manner. I may add, as an important fact, for the explanation of a distinction to which I shall shortly advert, that the French Code permits a special partnership, of which the capital may be divided into shares, or stock, transmissible from hand to hand. In such a case, the death of a special partner does not dissolve the firm, the creation of transmissible shares being a proof that the association is formed *respectu negotii,* and not *respectu personarum;* but even in such a partnership the death of the general partner effects a dissolution, unless it is expressly stipulated otherwise. But, says M. Troplong, it would be wrong to extend the rule that a partnership, of which the capital is divided into transmissible shares, is not dissolved by the death of a shareholder, to a special partnership, the capital of which is not so divided. The statute of New York recognizes only the latter kind of partnership, the names of the parties being required to be registered, and any change in the name working a dissolution, and turning the firm into a general partnership. Such a partnership has always been held to be dissolved by the death of the special partner. The Society, says the author just cited, "*reste alors sous l'empire du droit commun. Elle a formé entre le commanditaire et le comman-*

dité, un lien qui n'a pas été subordonné au caprice de mutations imprévues; elle a engendré des rapports mutuels de confiance, que le commandité ne peut être forcé d'etendre à des personnes étrangères." This partnership remains under the dominion of the Common Law. It has created between the special and the general partner a tie, which is not subjected to the caprice of unforeseen changes; it has produced mutual relations of confidence, which the general partner cannot be forced to extend to strangers. (*M. Troplong Com.; du contrat de Société civile, &c., T.* 1. *Preface,* 57, § 377, *&c.; T.* 2, § 888, *p.* 368.) The French jurists generally take the same position, defining the special partnership as a proper partnership, and applying the law of dissolution by death to all. (*Pothier Traité du contrat de Société, ch.* 2, § 2; *ch.* 8, § 3; *Merlin Répertoire, de Jurisprudence, Art Société,* § 7; *Duranton, Droit Francais, tom.* 17, l. 3, *Tit.* 9, § 470.) Pardessus discusses the question somewhat at length. (*Droit Commercial, tom.* 4, *Pt.* 5, *Tit.* 3, *ch.* 1, § 4.) It might be thought, he says, with some appearance of plausibility, that the rule of a dissolution by death should be limited to general partnerships, in forming which, the probity and intelligence of each member have been reciprocally taken into consideration. Indeed, the special partnership does not suppose on the part of the general partners any personal confidence in the special partners; and as the interest and the rights of the latter are exclusively limited to their shares, it would seem they were not modified by their decease, and their heirs called to take their place could have no right to insist that death has dissolved the firm, nor the general partners insist upon that result. These reasons, to question the general rule, appear, nevertheless, to yield to others more decisive. The persons and the character of the special partners have been regarded by the general partners when they formed this kind of association. The special partners, are, in effect, to a greater or less extent, called to the annual accountings, to meetings for the settlement of the profits and

losses, and to an examination of the state of the affairs This scrutiny, and a right to insist upon a dissolution in consequence of a breach of the contract, or to urge their claims when the affairs are liquidated, are more or less vigorously exercised. The difficulty of acting harmoniously with different persons, substituted in the place of those with whom the original contract was made; the distrust of heirs, who have not the grounds of esteem and confidence which influenced the deceased, and the impossibility of treating easily with minors, are some of the reasons which will not permit special partnerships to be excepted from the general rule. It may be objected that these reasons apply only in favor of the general partners, and that it is for them to judge as to the continuation of the business with the heirs. But the heirs of the deceased ought to enjoy the same privilege. Reciprocal rights ought to result from a mutual agreement. There is no solid reason why the special partnership should not be dissolved by the death of one of the partners, except when the capital is divided into transmissible shares, in which case the associates having consented that each may substitute another in his place, as he may desire, without the authority of the others, it is natural to conclude that the heirs of a deceased member fill his place in the same manner as if he had assigned his share. I have given the substance of the reasoning of Pardessus, and the result he attains has not only the authority of M. Troplong in its favor, but also that of other commentators (*M. M. Malpeyre, et Jourdain, No.* 474; *M. Persil, fils., p.* 344), while it does not appear to have been questioned or doubted.

It thus appears, that in the jurisprudence of that nation whence the peculiar contract of a special partnership has been adopted by us and grafted into our law,—where the system has long existed, is familiarly known, and its nature, qualities, and practical relations to various events and circumstances, have been well considered under the light of no brief experience—the effect of the death of the

special partner is to dissolve the firm. This agrees with the conclusion I had attained upon independent reasoning, before consulting these authorities, and I am consequently led to pronounce the firm in which the testator was a special partner, dissolved at his death; and to hold the executor, who was his general partner, responsible for the testator's interest in the firm at that time, upon a liquidation of the affairs as if made then.[2]

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[2] *Compare:* The interesting discussion of the origin of limited partnerships by Justice Hoffman in *Jacquin* v. *Buisson*, 11 How. N. Y. Pr. 385, 1855. See also *Coope* v. *Eyre*, 1 H. Bk. 37, 1788, at p. 48; *McArthur* v. *Chase*, 13 Gattan (Va.) 683, 1857. *Moorhead* v. *Seymour*, 77 N. Y. Supp. 1050, 1901, at p. 1054.

The position of the learned Surrogate that on the Continent of Europe the death of a special partner [The *commanditaire* of the *Société en commandite simple, i. e.*, formed *intuitu personæ*], dissolves the firm, is combatted by Isidore Alauzet, in his *Commentaire du Code de Commerce*, 1856, *tom* 1, p. 301:

"The death of a partner carries with it the dissolution of the partnership. This event changes the conditions of the contract; it was not a simple community of things that the deceased partner had founded, but an association of persons; and it is very natural that the association cannot continue, at least *ipso facto*, either between the surviving members of the partnership or between the survivors and heirs of the deceased partner. This rule does not cause any difficulty in ordinary partnerships. One may doubt if it is applicable to limited partnerships, when a special partner dies, and may ask if this event draws with it also, *ipso facto*, the dissolution of the partnership? or if such dissolution is denied, whether it gives to the heirs of the special partner or to the surviving general partners, or to both, the right of insisting on a dissolution? or, finally, one may ask if the rules established for limited partnerships apply to limited partnerships in which the capital is divided into shares of stock? If the capital of the limited partnership is divided into shares the general opinion is that the decease of a special partner cannot be a cause of dissolution. 'The partners,' says M. Pardessus, 'having joined the partnership on the assurance that each of them can substitute for himself whomsoever he will without the authorization of the others, it is natural to conclude that the heirs of the partner should replace him *ipso facto* in the same manner as if he had made the heirs assignees of his stock.'

"Legal opinion, let us say at once, undertakes to establish different rules depending on whether the capital of the limited partnership is or is not divided into shares of stock.

"Article 58 of the Code of Commerce, in permitting the capital of a limited partnership to be divided into shares, says in express terms that this circumstance does not carry with it any other modification of the rules established for this kind of partnership. The Code Napoleon cannot be cited as specifically regulating matters concerning limited partnerships, with which it does not concern itself. M. Pardessus solely supports his argument by the presumed consent of the managing partners that each special partner [where the capital is divided into shares] can substitute for himself an assignee. If in the case of the decease [of a special partner where the capital is not divided into

shares] the partners make a formal declaration to the effect that they accept the heirs in place of the deceased, is not the reason for permitting them to do so the same, and better established? Why, then, decide otherwise in this case? It is possible that the partnership articles may contain a stipulation to this effect, and give to the special partner the right of substituting for himself whom he will, as M. Pardessus says: How admit in that case the dissolution *ipso facto* by the decease of the special partner? M. Pardessus agrees that the better reasons, which he has set forth with his habitual logic, militate in favor of the theory contrary to his own (namely, that the death of a special partner, where the capital is not divided into shares, dissolves the partnership); but he contends that the same rights should belong to the special partners as to the general partners, on the ground that 'there cannot be rights, resulting from the nature of a reciprocal act which are not mutual.'

"To admit this reason as peremptory it is necessary at least that the obligation imposed on the two parties shall be equal. Under such conditions their rights cannot be different. In the limited partnership contract what obligations does the special partner leave to his heirs? He is only a partner as to the fund which he has invested in the business, not for his person. If the law reserves rights for him it is solely in his interest, but it does not impose any duty upon him. However, we do not demand anything better than to submit ourselves to the rule of 'mutuality in contracts' invoked by M. Pardessus. The limited partnership being completely outside the scope of the Code Napoleon, we cannot apply its provisions to them, but the death of a special partner can, like other causes left to the decisions of the Court, authorize either the general partners or the heirs of the special partner to demand the dissolution of the partnership, supposing it to be possible that the general partners could act for their own interest rather than for the interest of the partnership. This makes the rights of all parties equal.

"We should add, that M. Pardessus in the case, not of the decease, but of the insolvency of the special partner, goes even further than ourselves. He accords to the general partners alone the right to choose between the continuation or the dissolution of the partnership.

"The death of the general partner, even in the case where the capital of the partnership is divided into shares, should draw with it, *ipso facto*, the dissolution of the partnership.

"We should not ignore the fact that most authors, when the capital of the limited partnership is not divided into shares, teach that the decease of the special partner is the cause of dissolution. It will, therefore, be prudent for the general partners to stipulate in the articles, if they consider it proper, that the partnership shall continue with the heirs, there being nothing to place the least obstacle to such an agreement."

The part of the Code Napoleon referred to in the foregoing extract is Title ix, ch. 10. This chapter deals with the dissolution of *Sociétés*. The question in dispute is whether *Sociétés* includes *Sociétés en commandite simple, i. e.*, limited partnerships not having their capital divided into shares of stock. Section 1865 of the code provides that the death of a partner dissolves the firm, and section 1868 provides, "If the partnership articles contain provisions stipulating that the partners shall, in the case of the death of one of the partners, continue the partnership with his heir, or that the partnership shall only continue with the surviving partners, such provisions shall be adhered to. In the later case the heir of the deceased partner is only entitled to require a partition of the partnership property as it stood at the time of such death, and the heir has no share in any rights which the partnership may acquire after the death of such partner, unless they were a necessary consequence of

what had been done before the death of the partner to whose rights he has succeeded." [Trans. by Wright, London, 1908.]

Modern French opinion seems to be in favor of Pardessus. See *Droit Commercial par, Lyon-Caen et Renault*, 5th ed., 1899, p. 210, par. 352; French Commercial Law by Goirand, 2nd ed., 1898, p. 93.

The present German Commercial Code, Art. 177, provides: "The death of a partner of limited liability does not necessitate the dissolution of the partnership." [Trans. by Platt, London, 1900.]

SINGER *v.* KELLY.

IN THE SUPREME COURT OF PENNSYLVANIA, 1863.

44 *Pennsylvania Reports*, 145.

Thompson, J.[1] On the 15th of June, 1856, a copartnership was formed for the transaction of a general commission business, in the city of Philadelphia, between William J. Martin, William McAllister, and Charles Kelly, under the firm name of Martin & McAllister. It was to be a partnership under the Act of Assembly of the 2d of March, 1836. Martin and McAllister were to be the general partners, and Kelly the special partner. The firm was duly organized, and Kelly paid in $20,000 in cash, his agreed contribution to the firm. The firm commenced business, but in about six months failed, sinking the entire sum contributed by the special partner, and had an unliquidated indebtedness of some $78,000, which the assets were totally inadequate to satisfy.

Under these circumstances, the plaintiff has brought this action against all the partners, seeking to make the special partner liable on the ground that the business of the firm was changed, and that such change, without first having a new certificate, rendered him liable.

The evidence of a change, consisted of two distinct purchases by Martin & McAllister: one on the 26th of June, 1857, of fifty bales of cotton, amounting to $4,200, for which they gave notes; and the other four days after, of sixty tierces of rice, at $2100, also on a credit of four months.

The learned judge of the District Court, who tried the case, was of the opinion that there was no proof of knowledge or assent by the special partner to these purchases, outside the legitimate scope of the business of the firm. He

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[1] The Reporter's statement of the facts of the case is omitted.

therefore reserved the point whether a special partner could be made liable for a change in the business without a knowledge that it had taken place, and directed a verdict for the plaintiff, subject to the entry of judgment for the defendant *non obstante veredicto*. Subsequently, and after argument *in banc* in the District Court, judgment was entered for the defendant on the point reserved.

We have before us, therefore, the case, "pure and simple," of an effort to charge a special, as a general partner, on account of a change in the business of the firm, without any knowledge whatever of a change in the business of the firm, either in point of fact, or as a presumption arising from his connection with the transaction. Can this be done?

The section of the act under which this result is claimed, is the 12th Section, and reads as follows: "Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in other matter specified in the original certificate, shall be deemed a DISSOLUTION of the partnership, and any such partnership which shall in any manner be carried on after such alteration shall have been made, shall be deemed a general partnership, unless renewed as a special partnership according to the last (preceding) article."

The contest was therefore really between intelligent action as the ground of liability, on the one hand, and a claimed liability by force merely of the words of the statute, regardless of the element of knowledge or assent, on the other. Did the legislature mean this last position to be the true interpretation of the clause?

Unless it plainly appears that liability, without any reference to knowledge or intentional violation of the provision in question, was meant, we should not give it a construction tending to such penal consequences as is contended for. It would be contrary to natural justice, and such results should not be arrived at by interpretation, unless it be inevitable.

It is a maxim, further, which declares that no one shall suffer for another's fault: "*Nemo punitur pro alieno de-*

licto." I admit there are exceptions to the rule, however; things *mala prohibita* may induce liability sometimes without the knowledge, really of the party ultimately liable. In cases of suretyship, liability always arises out of the acts or omissions of the principal. But in these cases the consequence results from positive legislative regulations on the one hand, and the nature of the engagement on the other. But neither of these relations exist here. I cannot find any warrant, under a fair interpretation of the clause of the statute, for holding that the special partner is a guarantor for the general partners, further than his deposit according to the contract; nor that it is to be construed as a penal statute. I think that an analysis of the statute itself will show that its consistency can only be preserved, by holding the special partner to be involved alone by his own acts or omissions of violation, or by assenting to those of his copartners, when he knows or is presumed to know them.

We have no decisions on the precise point under consideration in our own state, nor have any been referred to as adjudged in other states where a similar law exists. We must therefore explore the meaning of this clause by the light of other provisions in the statute, involving the same responsibility.

Dissolution of the partnership is what, in contemplation of the law, was the first consequence to flow from any of the changes or alterations spoken of in the section. But the law also contemplates the carrying on of the business in an associated and general form of partnership, without the limitation provisions, and holding all liable as general partners. It is the carrying on of the business, after a violation in any of the particulars specified, which turns the concern into a general partnership. None of the general partners, without the knowledge or assent of the special partner, could change "the nature of the business," so as to render the special partner liable; it would be to apply a more severe rule than could obtain if the violation consisted in a change of the firm name, or of the capital or shares in it, which

manifestly could not be done without the assent of all; and yet the consequences would be the same. Thus, there would be no distinction between intended relations, and those neither intended nor known.

In many other provisions of the statute, the consequences of violations, are fixed to the extent of general liability of the special partner; but without exception, I think, they all imply the knowledge or assent of the party to be charged by the acts done, to which the consequence is attached. A false statement in the original certificate has this effect, and this must be made by all. So after organization, transacting the business of the firm, or acting as agent or attorney for it, interfering in its business, and perhaps, for reducing capital, will each render the special partner liable; but they all imply volition with knowledge of the act.

The twentieth and twenty-first sections of the act, especially, exhibit the rule of practice evidently intended by the legislature. Assignments for certain purposes, and with certain intent, after insolvency or contemplated insolvency by the firm, or by a partner under the same circumstances, is forbidden; and the twenty-second section, provides that if any special partner shall violate any of these provisions, or *assent* to any such violations, he shall be liable as a general partner. The ground of liability is here plainly expressed as only to ensue in consequence of a personal violation of the inhibited act, or assenting to its violation by copartners. I argue, therefore, that if the statute throughout, as I think it does, fixes the consequences of violation of its provisions to be general liability, and they necessarily imply knowledge and assent, we may fairly presume that the same cause was supposed to be necessary to produce the same result in the clause in question. If the change in the nature of the business, therefore, by his copartners, was not known by the defendant Kelly, and the business was carried on afterwards without his knowledge that it had been so changed, he would not be liable in consequence thereof.

It is not intended to deny that the requisites of the

statute must be strictly pursued, in organizing and conducting limited partnerships, but this should not change the rule of interpretation, which requires, in public beneficial statutes, that construction which will promote their objects rather than destroy them. One of the great objects of the system of limited partnerships was to encourage the employment of capital, without personal activity on the part of its owners, by associating it with industry and enterprise, which might not be possessed of capital. But should we hold that a change in the business, which might be made by the active partners, without the knowledge or assent, either actual, or to be presumed from circumstances, of the special partner, the capitalist, and he be liable notwithstanding, it would deter all prudent men from investing or embarking their capital in any such way; for by the very terms of the act he is not allowed to interfere with the operations of the concern. Such a construction would put him completely within the power and at the mercy of his copartners. But when we hold him only for his own acts or assent, we place responsibility on its true footing, the choice of the party.

These views are supported by the case of The Madison County Bank v. Gould, 5 Hill, 309. That case arose on the New York statute regulating limited partnerships, from which ours was copied, I believe, *verbatim*. It was attempted in that case, as in this, to hold the special partner liable as a general partner. One ground was a mistake of a month in the advertisement: in setting forth the commencement of the firm to be in November instead of October. The court there held, that as there was no evidence of an *intentional* violation of the statute in the mispublication, the special partner was not liable by reason of it. Another ground claimed for liability was the investment of a large portion of the capital in the purchase of real estate, not within the scope of the business of the firm. The special partner's liability was made to turn on the question of *knowledge and assent* to the purchases, although the conveyance was taken in his name, as well as that of his copartners. Bronson, J., said: "I cannot

think him liable for the wrong done by his copartners, without showing that he *participated* in the act." In the same spirit is Bowen *v.* Argall, 24 Wend. 497. We are of opinion, therefore, that there was no error in the ruling of this point in the court below.

We see nothing in the other specifications of error requiring special notice. We agree with the court below, that we see no reason for holding that the special partner had anything to do with the care and collection of the debts of the firm, after it failed. If he was not involved as a general partner, he had no concern in it. His money was in it, and applicable to the debts, and that was the only extent of his connection with it.

There was no offer to show that Kelly *assented* to any assignment of assets, so as to render him liable on that score, and the court properly rejected the naked offer to prove that the general partners made some such assignments.

Judgment affirmed.[2]

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[2] *Compare: Taylor* v. *Rasch,* Fed. Cas. 13, 800, 1874. (A, B and C formed a limited partnership, C being the special partner. The articles set forth that the nature of the business to be transacted was the purchase, sale and manufacture of furniture. A and B, without the knowledge of C, contracted a debt in the firm name for the purchase of clothing for themselves. *Held,* that the debt was not an obligation of the partnership. Longyear, J.: "Therefore, conceding that the arrangement in question was made with the general partners, as claimed in the answer, if it was not within the scope and purposes of the partnership, it was wholly unauthorized, and therefore void.")

SHERWOOD *v.* HIS CREDITORS.

IN THE SUPREME COURT OF LOUISIANA, 1890.

42 Louisiana Annual Reports, 103.

Poché, J. This appeal involves the discussion of the validity of a pledge granted by the insolvent to Francis Martin, his partner *in commendam,* on all of the insolvent's share in the partnership property, to secure an indebtedness of $5,000.

The contest between the partner *in commendam,* as a creditor of the insolvent individually and the creditors of the partnership.

The partner *in commendam* prosecutes this appeal from a judgment which refused to recognize and enforce his rights of pledge.

The pertinent facts are as follows: A pre-existing partnership, carrying on the business of manufacturing doors, blinds, sash, etc., under the style and name of the "Enterprise Sash, Door and Blind Factory," and composed of Alexander Smith, Francis Martin and Philip W. Sherwood, was dissolved in the early part of November, 1887, and Sherwood bought out Smith's interest in the concern for $5,000 cash, which he paid with money loaned him by Martin.

Immediately thereafter, Sherwood executed an act of pledge of his two-third interest in the factory in favor of Martin to secure his indebtedness of $5,000 to the latter.

On the same day the two entered into a copartnership under an authentic act, with Martin as a partner *in commendam,* to continue the same kind of business under the same style and name as heretofore. In the new business Sherwood contributed his undivided two-third interest in, and Martin his third of, the factory, with a stipulation of equal shares in profits and losses, limiting Martin's losses to his contribution.

On the 19th of April, 1888, Sherwood made a surrender of the partnership assets, and a syndic was appointed on June 5, 1888.

Martin's claim, under its terms and in accordance with the act of pledge, having matured, he obtained an *ex parte* order on June 12, 1888, for the sale of Sherwood's interest in the concern, which had been pledged to him.

Before a sale could be effected his proceeding was enjoined by the syndic on numerous grounds, one of which was that, as Martin was a partner, his pledge was of no effect toward the creditors of the partnership.

The syndic having thereafter proceeded to a sale of all the assets of the concern, he presented an account on which he placed Martin as an ordinary creditor only.

By way of opposition Martin urged his rights of pledge on the proceeds of two-thirds of the partnership assets. Whereupon Shakspeare, Smith & Co., creditors of the partnership, opposed Martin's right of being considered as a creditor of the partnership at all, on the ground that he was only a creditor of Sherwood individually.

The various oppositions and the injunction proceedings were consolidated and tried together, resulting in judgment by which the syndic's injunction was perpetuated, Martin's pledge was denied and rejected, in so far as it could affect the rights of the creditors of the partnership, his opposition dismissed, and the opposition of Shakspeare, Smith & Co. maintained.

From the foregoing statement of facts, tested under well settled principles of law and of jurisprudence, it is apparent that the judgment thus rendered is correct in every particular.

The fallacy of appellant's contention consists in his assuming the attitude of a third party or of a stranger, in dealing with the insolvency proceedings of Philip W. Sherwood, for the purpose of winding up the business of the concern known as the "Enterprise Sash, Door and Blind Factory."

It is elementary in commercial law, as well as under the provisions of the Civil Code, that "the partnership property is liable to the creditors of the partnership in preference to those of the individual partner." * * * Art. 2823.

And for such purposes, the partner *in commendam* is in no better position than an active partner. As a member of an insolvent partnership his only immunity consists in the restriction of his liability for the debts of the concern, to the amount which he had agreed to furnish by his contract. C. C. 2842.

A partnership with a partner *in commendam* may exist in every association known as partnerships, and it can not be treated as a separate division of partnerships. C. C. 2840.

Ulman & Co. *v.* Briggs *et al.*, 32 An. 660; Marshall *v.* Lambette, 7 Rob. 471.

Hence it follows that in determining the rights of Martin in and to the partnership assets as a creditor of Sherwood, he must be treated with the same measure which would be meted out to a simple commercial partner whose share in the concern is liable for partnership debts, and whose claims as a creditor of his partner must be subordinated to the claims of creditors of the partnership. Gueringer *v.* Creditors, 33 An. 1279.

As soon as the partnership between Sherwood and Martin was formed, their respective previous and individual interests or shares in the factory were vested in the ideal being known as the partnership, and no portion thereof could again become the property of the partners, but the *residuum*, after the payment of the partnership debts. 39 An. 362, Succession of Pilcher.

Hence the District Judge was correct, not only in holding that the pledge set up by Martin on the previous interest or share of Sherwood in the concern could not be enforced to the detriment of the creditors of the partnership, but that, as he was only a creditor of Sherwood, he had as such no

right to participate in the distribution of the proceeds of the partnership assets. His only recourse is on the *residuum* which might accrue to his debtor after the full liquidation of the partnership.

As he had no pledge which he could enforce adversely to the creditors of the concern, it follows that he had no legal right to wrench the property from the possession of the syndic for the purpose of effecting a sale of the same independently of the insolvency proceedings. Hence the injunction sued out to stay his proceeding, was properly perpetuated.

Judgment affirmed.[1]

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[1] *White* v. *Hackett*, 20 N. Y. 178, 1859. (The statute provided that in case of the insolvency or bankruptcy of the partnership, no special partner "shall under any circumstances" be allowed to claim as a creditor until the claims of all other creditors of the partnership shall be satisfied. A was a special partner. Besides his contribution he had made loans to the firm. *Held*, that as to these loans A was a postponed creditor. *Accord:* Dunning's App., 44 Pa. 150, 1863).

Clapp v. *Lacey*, 35 Conn. 463, 1863. (The statute provided that "All advancements to the capital stock by the special partners shall be made in cash * * * and no part of the capital furnished by such partner shall be withdrawn * * * nor shall any special partner under any circumstances be considered a creditor or allowed to claim as creditor in case of the insolvency or bankruptcy of the partnership." *Held*, a special partner making a loan to his firm above his contribution was, as to that loan, a creditor. The Court, in its opinion, lays emphasis on the fact that the sentence in which the prohibition occurs starts out to deal with "advances to the capital stock.")

Jaffe v. *Krum*, 88 Mo. 669, 1886. (*Held*, as *dicta*, that in the absence of a statutory provision that a special partner, loaning money to his firm above his contribution, was a postponed creditor as to such loan.)

HAGGERTY *v.* FOSTER.

In the Supreme Judicial Court of Massachusetts, 1869.

103 *Massachusetts Reports*, 17.

Colt, J.[1] Upon the agreed statement of facts, the defendant Foster must be held liable as a general partner in the firm of Barnes & Carpenter. In the formation of the special partnership under the statute, there was a failure to comply with one requisition which is made necessary in order to secure exemption from such liability.

By the Gen. Sts. *c.* 55, §§ 2-4, the special partner is required to contribute to the common stock a specific sum in actual cash payment as capital; all the partners must make and severally sign a certificate, which shall contain, among other things, the amount of the capital stock which each special partner has contributed; and if a false statement is made, all the persons interested in the partnership shall be liable as general partners for all the engagements thereof.

It is unnecessary to consider all the modes in which Foster attempted to complete his contribution as special partner. His liability as general partner is fixed, if within the true construction of the statute any one of the methods adopted is not to be regarded as an actual cash payment of any part of the amount. It is wholly immaterial that the transaction at the time was honestly intended and understood by the parties to be sufficient; that the securities actually transferred afforded the means by which their cash value was in fact subsequently realized; or that creditors were not actually defrauded. The statute is plain and explicit. It requires payment to be made when a certificate is signed, acknowledged and recorded as the foundation of the

[1] The Reporter's statement of the facts is omitted.

partnership; and this certificate must recite what has been done, not that which is executory. Its object is to provide a fund, on the day the company is formed, to be thereafter subject to no contingencies or losses, except those which come from the proper business of the partnership. The use of the phrase "actual cash payment," is emphatic and significant. It is wisely intended to exclude a construction, by which commercial securities, of any description short of cash, may be regarded, by the aid of mercantile usage or otherwise, as substantially equivalent to cash; and to remove from all parties the temptation to evade its requirements in this respect.

In the cases at bar, it appears that, on the day when the articles of copartnership were entered into, the Attleborough Bank had in its custody two obligations of the United States for one thousand dollars each, payable to bearer, which belonged to the defendant Foster and were deliverable to him or his order on demand, and which he authorized Carpenter, dealing with him as a member of the proposed firm, to take, sell and apply, as a part of his contribution, to the capital. These obligations were worth, at the time, somewhat more than their par value, and were in fact taken and sold by Carpenter some time in the month of September following, and applied to the use of the firm as it had occasion for the money. Assuming that the authority given to Carpenter to make this appropriation was sufficient, yet it does not appear that any action was taken under it by Carpenter, or any notice of the transaction given to the bailee of these securities, before they were finally taken and sold by him.

A majority of the court are unable to regard this as a compliance with a provision, which demands an actual cash payment, and requires it to be certified, acknowledged and recorded, before the partnership is formed. These securities were at best but the agreement of a third party to pay money at a future day; they cannot be treated as cash; they were not so treated by the bank, in whose safekeeping they

were placed, and which held them as a special deposit; nor were they so regarded by the parties themselves, who expressly provided for their future sale and conversion into money. If considered as equivalent to cash, yet there was no delivery of them valid as against the individual creditors of Foster, who for some considerable time afterwards held the legal title to them. *Pierce* v. *Bryant*, 5 Allen, 91. *Foquet* v. *Hoadley*, 3 Conn. 534.

It is not necessary to consider the manner in which the remaining part of Foster's contribution was made. It is sufficient that the certificate, to the extent indicated, contained a statement, which, though made in good faith by him, was a false statement within the meaning of the law. The statute cannot be construed so as to meet the hardships of individual cases. And judgment must be rendered against Foster, according to the agreement of the parties in both cases.

Judgment for the plaintiffs.[2]

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[2] *Compare: Holliday* v. *Union Bag & Paper Co.*, 3 Colo. 342, 1877. (The statute permitted the contribution of the special partner to be paid in property, but required that when paid in property it should be so stated and its cash value given. The certificate stated that cash had been contributed by A, when as a matter of fact the contribution was in groceries and promissory notes. *Held*, that A was liable as a general partner.)

Wilson v. *Bean*, 33 Ill. App. 529, 1889. (The statute permitted the contribution of a special partner to be made in goods. A firm was indebted to B. He cancelled the indebtedness on an agreement which was carried out that he should become a special partner to the amount of his debt. In the certificate he stated that he had contributed merchandise to the amount of the cancelled debt. *Held*, that the certificate was misleading and that B was liable as a general partner.

Chick v. *Robinson*, 95 Fed. 619, 1899. (A contribution of a certified check is a cash contribution.)

FOURTH STREET NATIONAL BANK *v.* WHITAKER.

IN THE SUPREME COURT OF PENNSYLVANIA, 1895.

170 *Pennsylvania Reports, 297.*

Assumpsit on a promissory note given by a limited partnership, formed under the Act of March 21, 1836.[1]

MR. JUSTICE DEAN. On the 31st of December, 1891, Granville B. Haines, Richard Wood, Samuel B. Brown, Richard W. Bacon and William Whitaker, of Philadelphia, by the name of Haines & Company, formed a limited partnership, under the act of 1836, for carrying on a wholesale and retail dry goods business; the term of the partnership was one year; Richard W. Bacon and William Whitaker were special partners, the others general; the special contribution of capital by each of the special partners, Bacon and Whitaker, was $100,000; $50,000 each in cash, and a like sum in merchandise, their entire contribution as special partners being $200,000. The articles of association were subscribed by all the partners, duly acknowledged and recorded in the office of the recorder of deeds for Philadelphia. At the end of the year 1892, under the provisions of the 11th section of the act of 1836, the partnership was renewed for another year. That section reads thus: "Every renewal or continuance of such partnership, beyond the time originally fixed for its duration, shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership."

In the articles of renewal in this averment, referring to their articles of the year previous: "The amount of capital

[1] The Reporter's statement of the facts of the case and his notes of the arguments of counsel are omitted.

contributed by each of the said special partners in the common stock was $100,000, one half thereof being in cash, and the other half thereof being in goods and merchandise, making the aggregate amount of capital contributed by them $200,000, as designated in the said original certificate, and the same remains unimpaired and undiminished, as their contribution to the present renewal and continuance of the said limited partnership, being in merchandise, an inventory and appraisement whereof have been filed in the court of common pleas No. 3 of Philadelphia county."

On the expiration of this renewed partnership at the end of the year 1893, there was another renewal for a year with like averments and certificate in the renewed articles, which were also made of record, as required by the act. The business was carried on, under this last renewal, until the 26th of March, 1894, when a general assignment for the benefit of creditors was made by the partnership. Before the assignment, the Fourth Street National Bank, the plaintiff, became the holder, for value, of six notes drawn by the partnership, each in the sum of $5,000, payable to the bank's order on demand, and dated respectively February 24, March 1, 5, 8, 14, and 21, 1894. These not being paid on demand, the bank brought suit against all the members of the firm, as general partners. The sworn statement of claim avers: 1. That plaintiff accepted the notes on the faith of the writing signed by all the members of the partnership, and recorded in the office for the recording of deeds, the 30th of December, 1893. 2. That said writing set forth that the original contribution of $200,000 in cash and merchandise, by the special partners, "remains unimpaired and undiminished as their contribution to the present renewal." 3. That at the time said writing was made and put on record, the entire original capital contributed by the special partners had been consumed and lost in the business, and the partnership of Haines & Company was insolvent. 4. That the statement, that the same remained unimpaired and undiminished, was false in fact.

The plaintiff therefore averred liability of each and all of the members of the firm as general partners.

To this the defendant, William Whitaker, made affidavit of defense, setting out, that on the last renewal of the partnership, on the 30th of December, 1893, all the members joined in a petition to the court of common pleas for the appointment of an appraiser of the assets of the proposed renewed partnership, and the appointment was made; that the appraiser under oath reported he had examined carefully and appraised the goods and merchandise of the proposed partnership, and that these included the original contributions of Whitaker and Bacon, the special partners, and the value of the same, as merchandise, was $200,000; that the partnership had other merchandise, accounts and cash, more than sufficient to pay its debts; further, that the $200,000 of merchandise appraised as the original contribution of capital by the special partners was set apart as such, and transferred to the new partnership. The defendant then avers on this preliminary statement of facts: 1. That he, at the time of the renewal, believed the statement and affidavit of the appraiser to be true, and that he, defendant, had done all that was required of him as a special partner. 2. That he is informed and believes the notes were not accepted by plaintiff on the faith of the statement; that the notes in suit are renewals of notes given for partnership debts of 1893, and are but a continuation of the evidence of indebtedness of the older partnership, before the articles of December, 1893, for renewal were entered into. 3. That the notes sued on were given without his knowledge or consent, and plaintiff knew when it accepted them the general partners had no authority to impose liability on him except as special partner. 4. That he has no personal knowledge as to any misstatements of fact in the articles of 1893; that he believed the statements of the general partners and of the appraiser, whose duty it was to know, to be true. On the record thus made up, plaintiff took a rule for judgment for want of a sufficient affidavit of defense; after

argument, the court below, in a carefully considered opinion, made the rule absolute, and defendant appeals.

The averment in plaintiff's statement that when the last renewal was signed the entire capital stock of the special partners had been lost in the business of Haines & Company, and the partnership was largely insolvent, is not denied in the affidavit of defense; it is denied by defendant there was any intentional misstatement on his part. It must, therefore, be here taken as true, that when all the members joined in the representation on the public records that the $200,000 capital remained unimpaired and undiminished, that statement was untrue in fact.

The question then is, what effect, if any, does an unintentional misrepresentation of this character have on the liability of defendant as a member of the partnership? As already quoted, the 11th section of the act provides for the attesting and recording of articles of renewal, and public notice of the same, under the same formalities as are required in the original formation of the partnership. The penalty of a failure to comply with the directions of the act as to the first organization is found in the 8th section, as follows: "And if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all engagements thereof, as general partners."

This court held, in Haddock v. Grinnell Co., 109 Pa. 372, that: "This evidently means that the affidavit shall give as full information upon the renewal as upon the original formation of the limited partnership. A mere formal affidavit setting forth the renewal only, would not give creditors any valuable information as to the condition of the firm, and the object of the act was to provide this notice."

Andrews v. Schott, 10 Pa. 47, is to the same effect, although in this last case there had been the introduction of a new partner, and the decision was rested on the ground that there was the formation of a new partnership instead of the renewal of the old one. But the point is settled by

a deliberately considered judgment in Haddock *v.* Grinnell Co., *supra,* that the requirements of the act, as to statement and affidavit for renewal, are as rigid as in those for the original formation of the partnership.

The object of the act was to open a venture to capital, with the protection or advantage of restricted liability; but upon a condition, that the public should have full means of knowledge as to the amount and character of the venture, and thereby be enabled to form a judgment as to how far the partnership was worthy of credit.

Here the record contained the joint representation to the public, of all the partners, in December, 1893, that the original $200,000 remained unimpaired and undiminished, when, through business losses before that date, it had in large part disappeared.

We do not consider it material that, as concerns this defendant, the misrepresentation was not intentional; that concerns his ease of conscience, but it neither restricts his liability nor affects the rights of creditors. The act seems to be carefully silent as to any modification of the language which operates to inflict the penalty. It does not say, willfully, knowingly, intentionally false statement, but simply, "if any false statement be made," then all persons interested shall be liable as general partners. As to the nature of such a misstatement as this, it is only necessary to recur to Haddock *v.* Grinnell Co., *supra*:—"When a special partnership is continued or renewed it must be in the same condition, so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired; it must be in such condition as to be available for creditors, and it is the duty of the general partner to furnish this information in his affidavit. If this duty is neglected, the partnership becomes general, and the special partner has no immunity."

Clearly, there was a false statement here of a most material fact, and although not known to defendant when he joined in the subscription to the articles, he cannot, for that reason, claim immunity as a special partner; it was

his legal duty to know the truth or falsity of statements subscribed to by him, and placed on the public records, and although ignorance of its falsity may exempt from the imputation of moral turpitude, the statute does not exempt him from legal responsibility.

The distinction drawn by the learned counsel for appellant between impaired and unimpaired capital of business partnerships is without weight in the interpretation of this statute; the object is to give information to the creditor of the financial standing of the partnership, when it invites business; its credit depends on its ability to pay; its ability to pay depends on the value of assets it can lawfully appropriate in payment; this partnership did have, in December, 1891, $200,000 capital in money and merchandise, to which the creditor of that term could look for payment of his debts; but, in December, 1893, the partnership was wholly insolvent; all its assets were insufficient to discharge its indebtedness; it had $200,000 worth of merchandise on hand, which was set aside, and called unimpaired and undiminished capital of the special partner. But to whom did this merchandise in equity belong? Certainly to those who had given credit on the strength of it, and it was under a pledge, both legal and moral, to them for their debts; all that was needed to enforce forfeiture of the pledge was a judgment ripe for execution. True, the mere physical possession of the merchandise was in the partnership, but the special partners could not have withdrawn from the insolvent firm $200,000 in cash, and have held it against the creditors; how could the partners, all consenting, lawfully put aside for the same partners $200,000 worth of merchandise? Yet it was represented by the statement, this $200,000 was subject to the claims of future creditors, as if the partnership had been then formed, and the capital first contributed, when the fact was, after having undergone the perils of two years' business, it was impaired to the amount that the debts of the insolvent firm exceeded the assets. Of this important fact the statement contained no hint. As

is said in Vanhorn v. Corcoran, 127 Pa. 255, where the assets of a partnership largely indebted were turned over as a contribution of capital to a limited partnership: "The whole of it in equity, was liable to creditors, and could not be withdrawn from them without fraud, until the last dollar of the debts of the firm was paid. So that instead of property, the defendants contributed a mere equity, to wit, whatever was left of the assets of the firm after payment of its debts."

As to the notes sued on being given for notes issued before the filing of the renewal certificate, the evidence of the old debt was extinguished, and a new security given; the general partners had an implied right to negotiate for extension of time on matured notes, and give those of the new partnership, which last was in possession of all the assets of the old.

It is argued by appellant, the effect of sustaining the judgment of the court below, here, will be to discourage the formation and renewal of limited partnerships, because capitalists could not longer invest their money prudently in such business enterprises. We have no fears of such consequence; for almost sixty years, limited partnerships have multiplied and prospered in this commonwealth, under an unbroken line of decisions, which have uniformly exacted strict adherence to all the material requirements of the law; the credit of such associations stands deservedly high in public estimation, because those who trust them feel they can rely on the truthfulness of their public statements; this confidence can only be maintained by a rigid judicial enforcement of those requirements which the legislature plainly deemed important; no prudent capitalist will refrain from investment in such enterprises, because compelled to a strict observance of the truth with regard to material facts; no prudent creditor will trust them, if this measure of business honestly be not exacted.

We see no error in the judgment, and it is therefore affirmed.[2]

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[2] *Compare: Tilge* v. *Brooks,* 124 Pa. 178, 1889. (The act relating to limited partnerships provided that if any false statement be made in the certificate or affidavit all the persons interested in such partnership should be liable as general partners. A, B and C tried to form a limited partnership, C being the special partner. There were irregularities in the formation which were sufficient to make C liable as a general partner for debts contracted during the term of the partnership. At the end of the term stipulated in the articles C withdrew without notifying D, a customer of the firm. A and B continued the business, buying goods from D. *Held,* that as there never had been a general partnership in fact, D was not liable for goods bought after the expiration of the term for which the limited partnership had been created. Paxson, J.: "Under our statute no general partnership was formed; it does not say that an omission to comply with its requirements shall have the effect of creating a partnership not intended by the parties," p. 182. See *contra, Haviland* v. *Chace,* 39 Barb. N. Y. Sup. Ct. 283, 1860.)

Fifth Ave. Bank v. *Colgate,* 120 N. Y. 381, 1890. (The statute relating to limited partnerships did not require the renewal certificate to state that the capital was unimpaired. A, B and C were partners, C being a special partner. The renewal certificate stated that the capital was unimpaired. This was false. *Held,* that this false statement did not make C liable as a general partner.)

Hogan v. *Hadzsits,* 113 Mich. 568, 1897. (A, B and C formed a special partnership, C being the special partner and contributing $10,000. At the expiration of the term, the partnership was renewed and the renewal certificate stated that C had contributed $10,000 in cash. At the time of the renewal the $10,000 contributed by C was not in the form of cash. *Held,* that the renewal certificate complied with the act, which did not require that the character of the capital at the time of the renewal be set forth. *Hoddack* v. *Grumell Manuf. Co.,* 109 Pa. 382, 1885, cited in our principal case, referred to and adversely commented on. See p. 574.)

CHAPTER VIII

ELEMENTS OF DIFFERENT FORMS OF ASSOCIATION.

THOMAS *v.* DAKIN.

WARNER *v.* BEERS.

IN THE SUPREME COURT OF JUDICATURE, AND THE COURT FOR THE CORRECTION OF ERRORS, NEW YORK, 1839, 1840.

22 Wendell's Reports, 2, and 23 Wendell's Reports, 103.[1]

Chief Justice NELSON: This is an action brought by the plaintiff, as president of the Bank of Central New York, an association formed under what is familiarly known as the General Banking Law, passed April 18, 1838, to recover several demands due the institution.

The defendant has demurred to the declaration, and urges the unconstitutionality of the law by way of defence; and it is insisted, in his behalf: 1. That the associations formed under this law are *corporations;* and 2. That a general law authorizing the creation of these bodies, is inconsistent with the ninth section of the seventh article of the constitution [which prohibited the creation of bodies politic

[1] The case of *Thomas* v. *Dakin* was decided in the Supreme Court in the October Term, 1839. During the session of the Legislature in the winter of 1840, the Court for the Correction of Errors heard two cases argued which had been brought up by writ of error from the Supreme Court, presenting the same questions which arose in *Thomas* v. *Dakin*, and the decision of which was based upon the opinions delivered in that cause. These cases are reported under the name of *Warner* v. *Beers*. The editors have selected for reprinting those portions of the opinions of Chief Justice Nelson in the Supreme Court and Senator Verplanck in the Court for the Correction of Errors, which relate to the question whether an association organized under the Act of April 18th, 1838, was a "body corporate." The other opinions, and the Reporter's statements of the pleadings in the cases are omitted because of their great length.

and corporate, unless with the assent of two-thirds of the members elected to each branch of the legislature]. On the part of the plaintiffs, it is urged in reply: 1. That the associations are not corporations; 2. That if they be, the act authorizing them may be passed by a majority *bill;* and 3. If within the ninth section, still the law may be passed by two-thirds of the members elected.

Are these associations corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term *corporation* in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders, that a corporation aggregate is an artificial body of men, composed of divers individuals, the *ligaments of which body are the franchises and liberties bestowed upon it*, which bind and unite all into one, and in which consists the whole frame and essence of the corporation. The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the *powers and faculties*, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. These *indicia* were given by judges and elementary writers at a very early day: since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope

and purpose of them, at this day, will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a *common seal,* or to *make by-laws,* may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary, in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which *a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act in fulfilment of the objects of the association as a single individual.* In this way, a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in effecting it, the operation is conducted with the simplicity and individuality of a natural person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensible to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various—limited or enlarged, at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have perpetual succession under a special name, and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate

name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities.

We will now endeavor to ascertain with exactness the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribe the duties of the comptroller in furnishing notes for circulation, taking the required securities, &c. The 15th provides, that any number of persons may associate to establish offices of discount, deposit and circulation. The 16th, that they shall make and file a certificate, specifying: 1. The *name* to be used in the business; 2. The *place* where the business shall be carried on; 3. The *amount* of capital stock, and number of shares into which divided; 4. The *names of the shareholders;* 5. The *duration* of the association. The 18th confers upon the persons thus associating, the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business; also to choose a president, vice president, cashier, and such other officers and agents as may be necessary. By the 21st and 22d sections, contracts, notes, bills, &c., shall be signed by the president and cashier; and all suits, actions, &c., are to be brought in the name of, and also against the president for the time being; and not to abate by his *death, resignation* or *removal*, but to be continued in the name of the successor. 24th section: The association may purchase and hold real estate, &c., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. 19th section: The shares of capital stock to be deemed personal property, transferrable on the books of the association; and every person becoming a shareholder by such transfer, shall succeed to all the rights and liabilities of the prior holder. 23d section: No shareholder to be personally liable; and the association is not to be dissolved by the *death* or *insanity* of any shareholder.

1. Upon a perusal of these provisions, it will appear

that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed, is made personal property, and the several shares transferrable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so moulded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, &c., loans money, sues and is sued, &c. It is true, some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, &c., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. 2 Bacon's Abr. 5. 2 Salk. 451. 2 *id.* 237. Ld. Raym. 153, 680. The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capac-

ity. All business is to be conducted in a common or proper name.

2. This artificial being possesses the powers of perpetual succession. Neither *sale* of shares, or *death* of shareholders affect it; if one should sell his interest, or die, the purchaser or representative, by operation of law, immediately takes his place. Sec. 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. Sec. 18. For the entire duration, therefore, of the association, and which may be without limit, Sec. 16, *sub.* 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. Sec. 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name, and in an artificial form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "*to exercise such incidental powers as shall be necessary to carry on such business*" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution.

The judgment was for the plaintiff, the majority of the Court holding, that, although the association was a corporation the act was constitutional on the assumption that it was passed by a two-thirds vote of the members elected to each

branch of the legislature, and the demurrer not reaching the objection that the act had not received the required two-thirds, though such an objection might be reached by plea.

Senator VERPLANCK: The decision of these causes seems to me to depend wholly upon that of the question, whether or no associations with constitutions, powers and incidents, similar to those authorized under the General Banking Law, are bodies corporate and politic; or, in other words, whether the General Banking Law of 1838 is void, because it was not passed with the expressed assent of two-thirds of all the members of the legislature. * * *

What, then, is the strict definition of the phrase *bodies politic and corporate?* * * *

Strict and essential definitions can generally be given of the terms of positive jurisprudence, and particularly so in the extremely technical and artificial system of the ancient English law. This is remarkably the case, for instance, in regard to our common law terms of real estate, as fee, lease, warranty, grant, covenant, reversion, remainder, &c.; all of which are defined precisely and essentially, not explained by mere attributes. *Bodies corporate* belong to that system, and thence do we immediately derive them. What, then, is a body corporate? What is its necessary and *essential* meaning? "It is called a body corporate," says Lord Coke, "because the persons composing it are made into one body." "It is only *in abstracto*, and rests only in contemplation of law." 10 R. 50. So again, he says, 1 Inst. 202, 250, "Persons capable of purchasing are of two sorts—*persons* natural created of God, and *persons* created by the policy of man, as persons incorporated into a body politic." If, leaving the quaint scholastic teaching of the father of English law, we come to the clearer and directer sense of our own Marshall, we find the same prevailing idea. "A body corporate is an artificial being, invisible, intangible, existing only in contemplation of law. Being the creature of law, it possesses only the properties conferred upon it by its charter. Among

the most important of these are immortality, and, if the expression may be allowed, *individuality*." 4 Wh. R. 636; 1 Peters, R. 46. Again: "It is precisely what the act of incorporation makes it; derives all its powers from that act, and is capable of exerting its faculties only in the manner which that act authorizes." "Within the limits of the properties conferred by its charter, it can," says Blackstone, "do all acts as natural persons may." "In corporations," says Professor Woodeson, "individuals are invested by the law with a political character and personality, wholly distinct from their natural capacity." "A corporation," says *Kyd on Corporations*, 13, "is not a mere capacity, but a political person in which many capacities reside." Thus, then, the essential legal definition that covers the whole ground, and expresses the very essence of the being of a body corporate, is this: "It is an artificial legal person, a succession of individuals, or an aggregate body considered by the law as a single continuous person, limited to one peculiar mode of action, and having power only of the kind and degree prescribed by the law which confers them." Such is the established notion of our common law. Such, too, as far as I can trace it, is the doctrine of the modern civil law, as modified by the jurisprudence of the European continent. "Communities that are lawfully established (i. e. corporations)," says Domat, one of the great teachers of the ante-revolutionary French civil law, "are in the place of *persons,* and their union, which renders common all their interest, make them to be considered as *one single person. Domat, Civil Law,* Lib. 1, tit. 15. To the same effect a somewhat older Italian civilian speaks, Oldradus De Ponte, as quoted by Sir Robert Sawyer, in his very able and learned argument in the case of the city of London. 8 St. Tr. 1175. "*Licet non habent veram* PERSONAM, *habent* PERSONAM *fictione juris.*" So the older German jurisprudence, as founded on the Roman law, also held the idea of *personality* as essential to corporations. Heineccius, one of the most distinguished civilians of that school in the last century, in his instructive essay on the legal history of the

corporate *guilds* or societies of trade so common in Germany, speaks of this personality as an attribute of all corporations. "*Universitates et contrahere possunt et delinquere, quippe quæ moraliter unam representant personam.*" *De Collegiis Opificum, in Germania, cap. 77,* Sec. 19. This doctrine of the modern civilians of France, Italy and Germany, may be traced up even to the jurists of the Code and Pandects. PERSONAE *vice fungitur municipium et decuria.*" *Pan.* 1, 22, *de fide juss.* I do not cite these civilians as direct authorities, but mainly to show how deeply and generally this pervading idea of legal personality and artificial individuality entered into and formed the characteristic of all corporate bodies, in those systems of law which might indirectly affect or govern our own, or tend to influence even the popular use of our legal terms.

So far was this principle of corporate personality carried in our old common law, that reasons were expressly assigned why a corporation could not be excommunicated or punished for crime. "Because it has no soul," said Lord Coke, which, however ludicrously it may now sound, was but saying quaintly, and in the style of that day, what in modern times would be expressed by saying that a corporation, being an artificial and not a moral person, must be incapable of guilt. The very able argument in the celebrated historical case of the charter of London in 1682, went a good deal into these refinements, and it was held on one side that a political person, had a mind and reason, according to Lord Chief Justice Hobart, and that its reason was expressed by its by-laws; whilst the attorney-general (whom Bishop Burnet has egregiously wronged in calling him "a hot, dull man)," argued most acutely, as well as very learnedly, in support of the capacity of a corporation to incur political, if not moral, guilt and punishment.

All these, it is true, are refinements of technical reasoning, in a taste and fashion of thought which have passed away; but they prove conclusively how strong and undoubted

was that legal principle of personality upon which these mere inferences and nice distinctions were founded.

In order to continue the existence of such an artificial person, perpetual succession is ordinarily necessary, though it is not strictly essential, for it may be confined to any given number of lives in being, holding in a sort of corporate joint tenancy, of which I think examples may be found. As a legal person, it has only the powers and properties specifically conferred upon it; and can possess and exercise no others, except such as are absolutely necessary to the exercise of the powers expressly given. This is the enactment of our revised statutes, which, as our revisers rightly said in their report on that title of the law, is "declaratory of a principle of law frequently recognized by our courts, and which it was deemed useful to confirm by legislative authority." To these are added certain legal incidents by the common law, also declared in our statute, and common to all corporations, as to sue and be sued, hold and convey real and personal property, to appoint officers for its services, and to make by-laws for the management of its affairs. To these more important rights, the law adds the external evidence of a name and a common seal. This last, though apparently a matter of form, is not without effect, any more than the legal consequences of seals to instruments in England and this state, so widely different from those of other legal systems, where the distinction between sealed and unsealed instruments is unknown. It is only through a common seal and name that any grant of lands or covenant touching them, can be made by a corporation.

There are several very useful and beneficial accessary powers or attributes, very often accompanying corporate privileges, especially in moneyed corporations, which, in the existing state of our law, as modified by statutes, are more prominent in the public eye, and perhaps sometimes in the view of our courts and legislatures, than those which are essential to the being of a corporation. Such added powers, however valuable, are merely accessary. They do not

in themselves alone confer a corporate character, and may be enjoyed by unincorporated individuals. Such a power is the *transferability of shares*, whereby investments may be made, without the owner losing the future control of his funds under changes of circumstances. Such, too, is the *limited responsibility* by which the stockholder, having once fairly paid up his share of the capital, is exempted from further personal liability. So, too, the convenience of holding real estate for the common purposes, *exempt from the legal inconveniences of joint tenancy or tenancy in common.* Again: there is the continuance of the joint property for the benefit and preservation of the common fund, *indissoluble by the death or legal disability* of any partner. Every one of these attributes or powers, though commonly falling within our notions of a moneyed corporation, is quite unessential to the legality of a corporation, may be found where there is no pretence of a body corporate, nor will they make one if all were combined, without the presence of the essential quality of legal individuality. This distinction has been observed and marked by Mr. Kyd, *Kyd on Corporations,* 13, with logical acuteness and precision: "A corporation is a political person, capable, like a natural person of enjoying a variety of franchises. It is to a franchise as the substance to its attribute. It is something to which many attributes belong, but *it is itself something distinct from those attributes.*"

Thus, the transferability of shares is not essential to a corporation. For instance, it does not enter into the constitution of our chartered colleges, academies, hospitals, and other corporate institutions founded by public endowment, or private beneficence. It does not enter into the charters of incorporated scientific and literary societies for mutual benefit or charity, in the funds of which the members have a beneficial interest. On the other hand, such a right of transfer may be incorporated into partnership articles, and become a fundamental condition of them. The general rule in absence of any express stipulation, is indeed the reverse of this, and in practice it is comparatively rare amongst us.

Hence it has become common to consider such transferability as a clear indication of a corporate character. "We have seen," says *Collyer on Partnership*, 647, "that *in common cases*, a partner is precluded from assigning his interest to a stranger, so as to make that stranger a partner. To prevent this rule from affecting the stockholder of a trading company, there must be provision in the deed of settlement enabling each stockholder to assign or transfer his share." He then adds the limitations rendered necessary in England by the Bubble act, which has no corresponding statute here, and the conclusion of the English decisions is, that by the common law, shares may be made transferable absolutely. *King* v. *Webb*, 14 East, 406. *Pratt* v. *Hutchinson*, 15 *id.* 515. *Nichols* v. *Crosby*, 2 Barn. & Cres. 814. *See also other cases collected by Wordsworth on Joint Stock Companies.* Again, the joint stock companies authorized by statutes in England, are avowedly and confessedly not corporations; and there, says *Wordsworth on Joint Stock Companies*, 183, "It is the object of all companies to render their shares as negotiable as possible, so that in fact the restrictions imposed by the deed of settlement upon the transfer of shares are generally very few, and seldom extend beyond requiring the transferrer's name, &c. being registered in the books of the company." The language of two or three of the later acts of parliament is specially worthy of attention on this subject. They declare, as strongly as words can declare legislative intention, that transferability of shares, and the consequent succession, can be authorized in common law copartnerships without giving to such companies any corporate existence, or rendering them the less copartnerships in the strict legal sense of the term. In the statute of 6 Geo. IV, ch. 42, it is enacted, "that it shall be lawful for any member of any such society or *copartnership*, their respective executors, administrators or assigns, to sell and *transfer* any share or shares, or portion or portions of, or the entire stock or interest which any such member may possess in such society or *copartnership*, and the property or funds thereof, subject to such reg-

ulations and restrictions as may be required by the constitution of such society or copartnership." This statute is entitled "an act for the better regulation of *copartnerships* of certain bankers in Ireland." The preamble and recitals, and all the sections speak of these banking firms as mere copartnerships. This strongly marked and repeated recognition of them as such, in the very sections authorizing that transferability and its consequent succession, which have been insisted on as infallible marks of corporate character leave no doubt in my mind as to the intention and understanding of the British parliament, that in authorizing associations with these and other powers similar to those granted by our banking law, they were not creating bodies politic or corporate.

But this is not all: parliament has not left its meaning and intention to be a matter of inference. In 1838, another act was passed amendatory of the one just cited, and of another in relation to bankers in England, which gave similar powers. That amendatory statute, after reciting and referring to the titles of these prior acts, adds in the preamble, "and whereas it is expedient that the said act should be amended, so far as relates to the powers enabling any such copartnership, *not being a body corporate*, to sue any of its own members, and the powers enabling any member of any such copartnership, *not being a body corporate*, to sue the said copartnership. Be it therefore enacted, &c. that any person now being, or who hereafter may be, a member of any copartnership carrying on the business of banking under the provisions of the said recited acts may commence and prosecute any action, &c."

There can then be no reasonable doubt, that in these most deliberately considered and very technically drawn acts of parliament, recognizing copartnerships as having transferable stock, and giving them the authority of suing in the name of their officers and other persons, similar to those of the associations formed under our act, no bodies corporate were intended or supposed to be created.

But, on this head of transferability, we need not rely upon English authority in our own usages and decisions.

In the articles of the Merchants Bank Association, before our restraining act, a similar transferability of shares was provided, and these articles have the authority of Alexander Hamilton for their validity. I shall have occasion to refer to them more fully hereafter.

So again, in the case of the Albany Exchange, before it received its present charter, the validity of the partnership or joint stock company for a public enterprise, with transferable shares, was expressly recognized. *By the Court* —Cowen, J.—"The objection taken on the argument, that this association was illegal, as being in the nature of a corporation, issuing scrip and providing for a *transfer of stock,* is not well founded. The act of associating in this way is, we think, properly characterized by the exception taken at the trial. It constitutes a partnership valid, as being formed for the purposes of a lawful, honest enterprise." *Townsend* v. *Goewey*, 19 Wendell R. 427. The learned judge then refers to, and adopts the authority of *Collyer on Partnerships,* p. 624, and the cases he cites.

Again, this transferability may be found in many sorts of trusts. A well-known instance of this may be seen in the Tontine of New York, originally built for the purposes of a Merchants' Exchange. It is a trust of real estate, with transferable shares as personal property; it was originally settled by the most eminent counsel of this state, and its validity has been attested by nearly fifty years experience, during which, above two hundred shares have passed through courts, assignments, insolvencies, bankrupt commissions, distributions of estates, &c., without their legal transferability having ever been impeached. *See printed articles of the Tontine, N. Y.*, 1793.

In both of these last examples, as in other instances of trusts and partnerships, lands were held exempt by operation of law from the legal incidents of joint tenancy, or tenancy in common, and the estate continued for the common purposes.

This has been noted as a mark of corporate character; yet most corporations are limited in the extent of its exercise, some are expressly excluded from the privilege, and very many exist legally without its actual exercise or enjoyment.

The non dissolution by death or by legal disability, is also noted in the opinion of the supreme court in these cases as a mark of a corporate body. But that also may be found in the trusts just mentioned, and others of a similar nature, and it may be adopted as an article of ordinary partnership. It is the settled law of England, that it may be stipulated that death shall not dissolve the partnership, and further, that the executors of the deceased shall become partners. *Collyer on Part.* p. 5, 648. *Pease* v. *Chamberlain*, 2 Vesey R. 33. *Haggerman* v. *Spears*, 7. Pick. R. 235. *Wrexham* v. *Huddleton*, 1 Swanst. 514.

Again: a common name has been regarded as a corporate criterion. To this Lord Ellenborough gives a full answer in *Rex* v. *Webb*. "As to the fourth point, that the subscribers have presumed to act as if they were a body corporate—how is this made out? It was urged that they assumed a common name, that they have a committee, &c. But are these the unequivocal evidence and characteristics of a corporation? How many unincorporated assurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings and by-laws? Are these all illegal? or which of these particulars can be stated as being of itself the distinctive and peculiar criterion of a corporation?" Thence he infers, that "these subscribers have not acted peculiarly as a body corporate." *Rex* v. *Webb*, 14 East's R. 406.

But, perhaps, in a general and popular understanding, the most familiar distinction between corporate bodies and common partnerships, or other joint undertakings, is the exemption of the associates from personal liability beyond the actual amount of their respective proportions of the capital. The regarding this very frequent and important incident of a corporation as an essential characteristic, seems

not to be confined to popular opinion. Judge Cowen says, in the decision of the cases now before us: "Among other peculiar privileges conferred on these associations, and not enjoyed by natural persons, I allude to that of the exemption of members from personal liability for debt. This is mentioned by Angell & Ames, in their treatise, as peculiar to a private corporation; they notice it as a striking characteristic between a corporation and a partnership." Yet our own statute of limited partnerships affords sufficient evidence that an alteration of the existing law may be made by statute, so as to exempt from personal liability beyond the stipulated share in the joint funds, for the debts, of a firm, without the remotest thought of converting such firms into bodies corporate. Besides, the right of making a contract, whereby those who tender it stipulate not to be bound beyond the amount of some specific pledged fund, must be a natural right growing out of the very nature of contracts. If a company or association, or an individual, offers to contract to make certain payments only to the amount of certain specific funds, and others choose to accept that contract on those conditions, there can be nothing to prevent the validity of such a contract, except some positive rule of law founded on policy or an arbitrary enactment. In the absence of such a restriction, it is and must be good. Such a limitation, then, must be binding on all who accept the conditions. The policy of our law and the usages of business have, indeed, rightly fixed the presumption the other way, so that the stipulation and the burden of proof of the limited indebtedness are thrown upon those who expect to be benefitted by them. This right has been substantially admitted by the highest tribunal in Great Britain, in the case of *Minnet* v. *Whinnery*, 3 Brown's Parl. Cas. 323, and it was held to be good by Lord Ellenborough, in *Alderson* v. *Clay*, 1 Camp. 404. The doctrine has been received as settled law by one of the best elementary writers of the day, often cited by our own supreme court. "When a creditor," says *Collyer on Partnership*, 214, "has notice, that by an arrangement

between partners, one of them, though appearing to the world as a partner, shall not participate in the loss, and shall not be liable for it, the creditor will be bound by the arrangement."

The original articles of the Merchants' Bank, in the city of New York, as an unincorporated association, with *limited liability,* as well as *transferable shares*, which were read in argument by Mr. Kent, have the great professional authority of Alexander Hamilton, who prepared them, and of the many eminent men who joined in them, and whose professional distinction gives to their approbation the character of a sort of judicial sanction; whilst the restraining act passed soon after, proves, as was unanswerably argued, that the legislature and its legal advisers considered such a voluntary association, thus restraining its own liability, not as a violation of common law, but merely as contradicting the financial policy of the state.

A similar analysis of such of the customary accessary powers of specially chartered moneyed corporations, as from being most conducive to ends of profit or convenience are ordinarily considered as the essential qualities constituting corporations, will show, that all such powers or incidents are merely convenient and desirable authorities or modes of action, added to and engrafted upon the creation of a body politic; not the legal attributes absolutely essential to a corporation, and denoting its existence as such.

Amongst us, as in England, bodies politic or corporate may exist where the ultimate personal liability is still retained. The personal liability is indeed suspended in such cases, and for a time merged in that of the artificial corporate person; but there may be an ulterior recourse to the corporators when the former fails. Many corporate banks in other states are so constituted, and with us some chartered companies for insurance, &c., some for an indefinite, others to a limited extent beyond the capital. Corporate bodies may exist also without transferability of the rights of the corporators; for a large majority of our literary and charitable, as well as all our municipal corporations, are so. On the other

hand, by our own common law as it would exist now, independently of statutory restrictions, associations might be formed and trusts created, having every one of the above enumerated characteristics, which have been insisted upon as essential to a corporation, except that personality which I before stated as forming its strict and necessary essential legal definition. The present joint stock companies of England afford pregnant examples, showing how many of these attributes may be embodied in voluntary associations which are confessedly not corporations.

In fact the line may be very faint, and depending wholly upon the purely legal and technical character conferred, whether a joint stock association or a trust, freed by law from certain positive restraints imposed by our modern statutes, be a corporation or not. The Tontine trust, before mentioned, is managed by directors annually elected by stockholders; its real estate is held by trustees, continuing their trust from hand to hand during the lives of the original nominees and the survivors of them, with transferable shares, and wholly without personal liability. For the reasons already stated, the eminence of the counsel (the late R. Harrison) who prepared the trust, and the frequency with which its legal character must have passed in review before lawyers and courts, and always without objection, it may well be regarded as sanctioned judicially. It is a valid trust. Add to it a legislative charter, making the associates a body corporate and no more, what then is the effect? Simply to give a different technical character, an artificial *individuality*, in Chief Justice Marshall's phrase, a different mode of standing in courts.

Such was the actual history of the Albany Exchange. It was a joint stock company, formally decided to be valid. 19 Wendell's R. 427. A year or two after (1837), it appears by our statute book to have been incorporated. But there is probably but little difference, besides the greater convenience of the corporate body, between the former organization and the present.

The trusts specially permitted by an act of last year, *Statutes of* 1839, chap. 174, for the benefit of that singular people called *Shakers*, were nothing more than exemptions from the recent restrictions of trusts. They were authorized to continue, enlarge and manage their property, by trusts, as they had done before the change in that title of our law effected by the revised statutes. Had the law, in addition to this, made every Shakers' United Society a body corporate, without otherwise varying the original trust, the only change would have been the conversion of a trust into an artificial legal person, with the same effect substantially as to the interests of those beneficially interested.

Our act for general religious corporations regulates the incorporation of churches of all religious denominations (other than those provided for in the first and second sections) by trustees, who are to be a body corporate.

Those who have had occasion to look into the mode in which dissenting religious trusts are held in England, as I presume they were, in the same manner, in New York when a colony, will, I think, perceive that our statute adds little more than a convenient corporate character to powers elsewhere, and formerly here, exercised under trusts.

All these considerations lead me to the conviction, that for the purpose of constitutional interpretation, we must look to the strict legal meaning of the phrase *body politic or corporate*, and not to those circumstances or adjuncts, which amount only to descriptions of the manner in which such bodies are very frequently constituted when used for purposes of profit. If this be regarded as a very strict rule of interpretation, let it also be remembered, that it is applied where such strictness is most appropriate, in the interpretation of a provision, restraining the general sovereign power of the state expressing the public will through a majority of the people's representatives.

There is yet another rule of interpretation, which it is proper to state before proceeding to examine whether the

associations organized under the banking laws are or are not corporations.

Corporate rights are well defined by Chancellor Kent and others to be "franchises or peculiar privileged grants," of the nature of incorporeal property. Such franchises, when they are granted for pecuniary or other purposes valuable to private interest, are of the nature of monopolies, and are always granted exclusively by the sovereign power, directly or indirectly. It is a well known fact admitted on all sides, that it was part of the policy and intent of our amended constitution, to prevent, by a constitutional and fixed limitation of the legislative authority, the influence of corruption or interest upon the legislature, as well as the abuse of political favoritism, and the dangerous union of political with pecuniary power. The clause so designed, though so general in its terms as to include even academies and village corporations, it is not doubted, referred in its policy wholly to the monopoly privileges of chartered capital, and especially to banks.

Here then, in my view, arises another branch of inquiry; and the two distinct objects of examination are these: 1st. Do these banking associations fall within the right legal definition of the words "bodies politic or corporate," as before explained and established? 2d. Do they come within the policy and intent of the framers of the constitution or of the people who ratified it?

The most peculiar, and the strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence. Now this is *not* found in the associations under the act. A *corporation* can sue and be sued only by its corporate name. It can act only according to the letter of the law creating it. "It derives all its powers from that act," says Chief Justice Marshall, "and is capable of exercising its faculties only in the manner which that act authorizes." It has no natural powers which, in

its discretion, it may exercise or not. It can exercise none of those other powers, and possesses none of those other rights which the individuals composing it could possess and exercise, were it a mere society or partnership. Not so as to these *associations.* By this act, suits on behalf of such associations *may* be brought in the name of the president. Persons having claims against the company, *may* maintain their actions against the president. But there is no reason, except that of mere convenience, why the association may not also sue and be sued under their several real names, as other partners may. This reason of convenience, it is obvious, would not apply where the company was composed of a few persons, as if, for example, one of our great banking firms were to come under the law.

It was indeed argued, that the technical construction which gives to *may* the meaning of *must* or *shall,* applies here. But that construction holds only when there is a previous duty, to which the statute adds some new power or authority, as in the case of a public officer; or where from other reasons it is manifest that (to use Judge Story's words) "the legislature meant to impose an absolute duty, not to give a discretionary power;" otherwise, as he says, "the ordinary use of language must be presumed to be intended, unless it would defeat the provisions of the act." 1 Peters' R. 64. The ordinary popular discretionary sense of the word *may,* is also the ordinary legal one. The other is the exception. In our revised statutes, the words *may* and *shall* are so used and distinguished. So they are in our annual legislation, as when it is said of a company, that it *may* hold real estate, *may* take a certain rate of tolls, *may* borrow money.

Moreover, here the right to sue and be sued as other partners, is a common law right, and cannot be taken away by mere implication. "A statute made in the affirmative, without negative words," say the highest authorities, "does not take away the common law." 2 Inst. 200. *See also*

Dwarris on Statutes, 637, and the authorities there referred to.

To return: if the associations issue notes for circulation, they must first comply with the express conditions of the act as to the requisite security. So far as they deal with the public as bankers, they must, for the common security, comply with the requisition of the statute. But if such an association were a body corporate, it could do nothing more than the act permits, and that only in the manner the act prescribes. In the words of our revised statutes (declaratory, as the revisers state, of the common law), "No corporation shall possess or exercise any corporate powers (in addition to those expressly given in the act under which it is incorporated), except such as shall be necessary to the exercise of the powers enumerated and given." In the *per curiam* opinion of the supreme court of the United States, 4 Peters' R. 179, it is said that "a corporation is strictly limited to the exercise of powers specifically conferred, cannot be denied." But here, the associates by their articles establish and form their own constitution, as any other voluntary joint stock company may do. Nor can I discover any objection, other than such as the articles might present, or prudence dictate, why the association, whilst as bankers complying with the requisitions of the act, could not also exercise their common legal rights as partners, in other commerce, waiving so far the advantages of exemption from personal liability. So, too, it seems that waiving the transferability of shares, the same associates might also trade as a limited partnership, with its president as the general partner, and the others, special partners, in any business coming within the statute on that subject. Some such union of banking with other collateral business might well take place, whenever such an association shall consist of a small but wealthy firm. An association under this act might then do what no corporation can do. The same association under the same articles, might have one fund for its special bank-

ing purposes with a limited liability of its owners, and another for trade as general, or even as limited partners.

Again: these associations do not act by a corporate name and seal, but by another mode familiar to our law. They can contract through their president, as a limited partnership must through its general partner. They are authorized to sue and be sued through him; as Judge Cowen observes, "the power of the legislature to give a right of action to one man in his own name for a debt due to another, has always been exercised from our earliest legal history, and it is now too late to call it in question." I refer to the several legislative and judicial authorities which he has collected in his opinion on these cases. They cannot hold real estate as a corporation does, or contract concerning it by their own name and common seal; but, like partnerships, they can have an equitable and beneficial interest in land. Collyer, 70, 76. Their president takes as a trustee, and the associates are but beneficiaries.

Similar interests in land are held in trust, as in the New York Tontine and other old unincorporated associations; and by the Shakers, on trusts established before the statute restraining trusts, and since by means of a private act, merely restoring the common law as respects them, by taking them out of the operation of the statute. Much such an interest in lands was also held by the Albany Exchange Company before its incorporation, in 1837, and the decision of our supreme court, in 19 Wendell, 424, admits its validity.

How then are these associations to be regarded in legal contemplation?

I assent fully to the conclusive reasoning of the counsel, who chiefly pressed this part of the argument (Mr. Kent), that they are copartnerships relieved from the inhibitions of the restraining act, and thus allowed to carry on banking business under certain conditions. The policy of the state has prohibited its citizens from issuing paper for circulation as money, or from associating together for certain banking purposes. 1 R. S. 711. It reserved those privileges for

corporate banks. The act to authorize the business of banking repealed that prohibition *pro tanto*, as to all individuals or companies who would comply with its conditions. The associations in question are partnerships complying with those conditions, and thus exempted, as any other citizens may be on the same terms, from the operation of a statutory restraint of general right, which is still binding on all who will not comply with the conditions. This is so far in close analogy to the law of special partnership, where exemption from the general liability imposed by the law is tendered to all who comply strictly with the provisions of the statute. The articles and certificate in this act correspond to the certificate setting forth the names of partners, amount of capital, time of termination and nature of business, required by the title of "Limited Partnerships," 1 R. S. 764, and with the articles which every such copartnership must have. The general partner there is authorized to transact business and contract for the rest; so, though with less authority, is the president here. The mode of sueing and being sued is precisely the same in both cases.

These partnerships are permitted to do what it has been shown other partners may also do by voluntary act, in providing for the transferability of the shares of the stock, and also against dissolution by death or insolvency. If they choose to trade with a limited liability, always desirable when the shares are numerous, they may do so in a somewhat more commodious manner than in an ordinary limited partnership, though on the very same principles. This, too, has been shown might also be done on common law principles by means of due notice (as in the instance of the old Merchants' Bank), without special legislation. If the associates think fit to waive this exemption, they may do so, and they are then a banking company, carrying on business precisely as any firm might do upon a simple repeal of the restraining act. Certain conditions are imposed to entitle them to the benefit of this conditional repeal. They can issue no paper, unless it be secured in a certain way and duly attested by

the comptroller. The very same conditions are imposed on every individual who thinks fit to engage in this business. They are allowed to purchase real estate and hold it for certain partnership uses. So may ordinary partners. *Coles* v. *Coles*, 15 Johns. R. 159. 2 Edw. Ch. R. 28. But the conveyance is to be made to the president, who has power to sell or assign the same free from any claim against any of the shareholders, or persons claiming under them. This is rather a limitation than a grant of power. The associates are limited to their president, or some other officer named in their articles, instead of choosing such a trustee as they might please at the time; otherwise, it is with this slight restriction a mode of holding real estate familiar to the former law of trusts here, still used in England, and for many purposes yet allowed in this state. The president or other officer may receive a conveyance, and may sell or assign the lands so conveyed. Thus he holds the land in a trust, coupled with a power of disposition, as it would be called in England, or formerly here. This authority over the lands is, in the language of our Revised Statutes, "a power in trust," and the beneficial enjoyment of such a power is no peculiar privilege. The association *may* sue and be sued, just as other partners may; but as this would frequently be of great public inconvenience, it is enacted for the mutual benefit of the associates and of those with whom they may litigate, that they may also sue and be sued in the name of their president. A mere innovation in the mode of pleading, as to certain classes of citizens, can hardly work any change in the permanent legal character of those to whom it applies. There are various English acts, within the last twenty years, expressly giving the same powers to officers or agents of partnerships in England and Ireland; a course of legislation approved by Lord Eldon, and still, in his view, leaving such companies mere partnerships. 1 Russ. R. 460. It is in effect doing in this act what had already been done in the law of limited partnership, where it is enacted, that "suits in relation to the business of the partnership *may* be

brought by or against the general partner, in the same manner as if there were no special partner." 1 R. S. 766, Sec. 14.

Had there been a simple repeal of the restraining act, so that limited partnerships could carry on this business, there would have hardly been any necessity for the new provision. It is to be observed, that in both cases the statutes say, *may* (not *shall*) sue and be sued, which is wholly diverse from the case of corporate bodies, which can only sue and be sued in their single corporate legal personality. These, then, are partnerships, or joint stock companies, limited as to personal responsibility, if they so elect, as they might be by the common law in one way, and by our limited partnership act in another. They may, if they deem it expedient, make their shares assignable and transferable to new partners, and their company indissoluble by death or legal disability, of individuals, as other companies may also do. They may have a beneficial interest in lands, managed by a power, with the legal estate in a trustee. They may sue and be sued in the name of the head of the firm, as limited partners also may, and like them, are capable of suing and being sued in the same manner as ordinary partners. Finally, they are released from the restriction of the restraining act on certain conditions being performed, and may then use their capital in banking, as all other firms might, were that law wholly repealed; but it does not appear that they are absolutely restricted to that one business and no other, as incorporated banks are and must be, unless specially authorized to transact other business.

If this view of their nature and character be correct, they differ entirely in contemplation of law from the legal corporate person, in which all individualities of its members are merged, so far as they act together in this body, which can perform only certain specific acts, sue or be sued but in one way, grant, convey and covenant only in its own name and by its common seal.

There is again yet another wide difference, which to

my mind strongly marks the broad distinction between these associations, in which partnership rights and liabilities are still retained, and corporate bodies, where such prior joint rights of the corporators are absorbed in the individuality of the body which takes the place of the individuals who compose it. Corporations formed under an act illegally passed, or unconstitutional in itself, may be proceeded against by *quo warranto,* and on judgment the body is ousted and altogether excluded from its corporate rights, privileges and franchises. 2 R. S. 583. The effect of this, where an act is pronounced void, would be, that the corporation becomes extinct, is abrogated, has no longer an existence in law. Now let us suppose that this act may grant some corporate powers, as the chancellor has intimated. I do not myself find them. But we may suppose the transferability of shares, as insisted upon by our judges, to be a corporate power. An information in the nature of a *quo warranto* may be exhibited against any association formed under the banking law, and on judgment it is ousted of this or any other privilege, and excluded from it as a franchise. Be it so. What is the result? The association, debarred from this power, still remains a valid company. The exemptions from the restraining law must still be valid, for such a conditional exemption has nothing in common with any question of corporate right. It would still remain a voluntary joint stock company, carrying on a legitimate business under articles of partnership, and with limited liability (if the associates elect), very similar to other limited partnerships in trade. It would still have its common law and statute partnership rights and powers, though inhibited from some one or two powers enumerated in this act. It would still be what its name purports, a valid association. This criterion affords to my mind conclusive evidence of the wide difference between incorporated banks and banking associations, and I cannot but add that it also seems to me conclusive as to the validity of the act. If the legislature have in any provision inadvertently stepped beyond their constitutional bounds,

that provision may be void. The main provisions of the law are within the ordinary bounds and purposes of general legislation, and the associations formed under them are legal and valid, even should there be some power mentioned in the act from which the judgment of a court may rightfully exclude them. It therefore appears to me clear, that the legislature of 1838 have succeeded in their obvious and indeed avowed intention to authorize voluntary associations, not within the two-thirds restriction of the constitution, or of the legal doubts that might arise, if they were permitted to incorporate themselves under some general law. * * *

On the question being put, *Shall these judgments be reversed?* all the members of the court, with but a single exception (*twenty-three* being present), voted in the *negative*. Whereupon the judgments of the supreme court were AFFIRMED. The court thereupon adopted the following resolutions:

1. "Resolved, That the law entitled 'An act to authorize "the business of banking,' passed 18th April, 1838, is valid, "and was constitutionally enacted, although it may not have "received the assent of two-thirds of the members elected "to each branch of the legislature." This resolution was adopted by a vote of 23 to 1.

2. "Resolved, That the associations organized in con- "formity with the provisions of the act entitled 'An act to "authorize the business of banking,' passed April 1st, 1838, "are *not* bodies politic or corporate, within the spirit and "meaning of the constitution." This resolution was adopted by a vote of 22 to 3.

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[2] In *The People* v. *Assessors of Watertown*, 1 Hill 616 (1841), the question arose in the Supreme Court whether an association formed under the act was liable to taxation on its capital stock. Such an association, the Bank of Watertown, denied its liability on the ground that it was not a corporation.

The Court held it was a corporation. Bronson, J.: "That they are corporations, was adjudged by this court in the case of *Thomas* v. *Dakin* (22 Wend. 9), and the like judgment between other parties has since been affirmed in the Court for the Correction of Errors (*Warner* v. *Beers*, 23 Wendell, 103). I am aware that one or two members of the court entertained some doubt upon this question, but they seem finally to have settled down upon the conclusion, that although these banking

companies may be corporations for all other purposes, yet they were not so within the spirit and meaning of that clause of the Constitution which requires a two-thirds vote for the creation of a body politic or corporate. Mr. Senator Verplanck, who went further than any one else towards denying their corporate capacity, concluded his opinion with the very cautious and guarded remark, that 'these associations under the banking law do not *rightly fall within the true legal interpretation of the restraining clause of the Constitution*, and still less within its spirit and design.' This is far enough from saying that the free banks, as they are sometimes called, are not corporations to every intent and purpose save that which relates to the mode of creating them." * * *

"A brief reference to some facts which do not appear in the case as reported, will serve the double purpose of vindicating the court against misconstructions of the resolution, and showing that the members who voted for it were far enough from intending to affirm that these banks are not corporations. On the day, or the day following the decision of the Court for the Correction of Errors in the case of *Warner* v. *Beers*, a resolution was offered by Mr. Senator Verplanck, affirming in direct and unqualified terms that these associations, 'are not bodies politic or corporate.' Whether the mover was himself prepared to vote for such a resolution, or whether it was only offered for the purpose of collecting the sense of the members on the abstract proposition which it contained, I am unable to say. But that such a resolution could not have been passed, is, I think, quite clear. It was laid on the table by common consent, and was not again taken up until thirteen or fourteen days afterward. When the consideration of the resolution was again resumed, it was immediately amended by unanimous consent—the mover himself, as I believe, not objecting to that course—by adding the very significant words, 'within the spirit and meaning of the Constitution;' and in that form it was adopted. Now, whatever may be inferred from simply reading the resolution as it finally passed, the history which I have given of its original form and subsequent progress, renders it impossible to say, that any member who voted for the resolution intended to deny that these associations are corporate bodies. In confirmation of this remark, I may add the further fact, which does not appear by the report, that the Chancellor, who fully agreed with this court in the opinion that these banks were corporations, voted for the resolution as amended—indeed, I believe the amendment was proposed by him, and for the avowed purpose of meeting the views of those who agreed with him in the opinion that the free banks, though corporations, were not such within the intent and meaning of the Constitution."

On the question whether associations formed under the act were corporations he says:

"A corporation aggregate, is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person. It does not occur to my mind that anything else can be essential to the definition. Such a union as I have mentioned, can only be effected under a grant of privileges from the sovereign power of the State. A corporation is therefore said to be a legal being, or the mere creature of law. It is convenient, though not absolutely necessary, that this artificial person, like a natural one, should have a name by which it may be known and designated in the transaction of business. And when the doctrine was, that a corporation could only contract by its seal, a seal was said to be an indispensable requisite. So, immortality was once thought to be an attribute of all corporations; but that now means no more than a continued succession of members for such period, whether long or short, as may be allotted to this legal entity by its creator.

"Now, a banking association formed under the law of 1838, not only may, but it must have a name; and a seal, though far from being essential to the existence of a corporation, is nevertheless an incident to the grant of corporate privileges, though not mentioned in the grant. This is not only so at the common law, but by the statute also (1 R. S. 599, Sec. 1). The right to sue and be sued is expressly conferred on these associations; and whether the suit is brought in the name by which the company transacts its other business, or with the addition of the name of its president, cannot be material. A corporation may have one name for one purpose, and another name for another purpose. And besides, the general banking law only provides, that action *may*—not that they *shall*—be brought in the name of, or against the president; and the right to sue and be sued, like that of having a common seal, is not only a common law incident to the grant of corporate powers, but the Legislature has expressly provided that this power shall vest in every corporation, although not specified in the act under which it shall be incorporated (1 R. S. 599, Secs. 1, 2). We have already held, more than once, that these associations may sue or be sued in the same corporate name by which their other business is transacted."

The question of the nature of associations organized under the Act of 1838 came again before the Court for the Correction of Errors in the case of *Gilford* v. *Livingston*, 2 Denio, 380 (1845). The following resolution was adopted: "Resolved, That the judgment of the Supreme Court is reversed on the ground that the decision of this court in the case of *Warner* v. *Beers*, decided that the law entitled 'an act to authorize the business of banking,' passed April 18, 1838, is valid and was constitutionally enacted, although it may not have received the assent of two-thirds of the members elected to each branch of the Legislature; and that the decision in that case is conclusive."

Seven of the twenty-two judges voted in effect against this resolution. There are two opinions reported, one by Chancellor Walworth in favor of reversal on the ground that *Warner* v. *Beers* decided what Bronson, J., said, in *The People* v. *Assessors of Watertown, supra*, that it did decide, and one by Senator Hand, to the effect that the act was unconstitutional because it had not been passed by a two-thirds vote, and the associations formed under it were corporations.

THE PEOPLE, *ex rel.*, WINCHESTER *v.* COLEMAN, *et al.*, COMMISSIONERS OF TAXES.

In the Court of Appeals, New York, 1892.

133 New York Appeals Reports, 279.

Appeal from order of the general term of the Supreme Court, in the first judicial department, made February 13, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the Court on trial at Special Term, vacating an assessment.[1]

Finch, J.: The relator was taxed upon its capital on the ground that it had become a corporation within the meaning of the provision of the Revised Statutes which enacts that "all monied or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." (1 R. S. title 4, chap. 13, part 1.) The company was formed as a joint stock company or association in 1853 by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common law rights of the individuals and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement and dependent in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the legislature had explicitly recognized the existence and validity of such organizations, founded upon

[1] The facts as stated by the Reporter are abbreviated, and his notes of the arguments of counsel omitted.

contract and evolved from the common law rights of the citizens. (Laws of 1849, chap. 258.) That act provided that any joint stock company or association, which consisted of seven or more members, might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates. But the act explicitly disclaimed any purpose of converting the joint stock associations recognized as existing, into corporations by a section prohibiting any such construction. (Sec. 5.) In 1851 the act was amended in its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that when the company was formed and went into operation the law recognized a distinction and substantial difference between joint stock companies and corporations and never confused one with the other, and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint stock companies or associations.

But two things have since occurred. The legislature, while steadily preserving the distinction of names, has with equal persistence confused the things by obliterating substantial and characteristic marks of difference, until it is now claimed that the joint stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation, without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. (*Thomas* v. *Dakin*, 22 *Wend.* 9; *Bank of Watertown* v. *Watertown*, 25 *Id.* 686; *People* v. *Niagara*, 4 Hill, 20.) It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that

a series of statutes, beginning with the act of 1849, has ended in the gift to joint stock associations of every essential attribute possessed by and characteristic of corporations (Laws of 1853, chap. 153; Laws of 1854, chap. 245; Laws of 1867, chap. 289); that the lines of distinction between the two, however far apart in the beginning, have steadily converged until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated, and no reason remains why joint stock associations should not be in all respects treated and regarded as corporations.

Some of this contention is true. The case of *People ex rel. Platt* v. *Wemple* (117 N. Y. 136), shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint stock associations, until the difference, if there be one, is obscure, elusive and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the acts of 1880 and 1881, which formed the subject of consideration in the *Wemple* case, the legislature, dealing with the subject of taxation and desiring to tax business and franchises, imposed the liability upon "every corporation, joint stock company or association whatever now or hereafter incorporated or organized under any law of this state." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint stock companies could not properly be said to be "incorporated," but might be correctly described as "organized" under the laws of the state. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organiza-

tions upon which it could rest, or out of which it grew, for the distinction so seduously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in *Supervisors of Niagara* v. *People* (7 Hill, 512), and in *Gifford* v. *Livingston* (2 Den. 380), by the statement that the corporators lost their individuality and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on behalf of the respondents to be "an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and non-existent." I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial we may take the nature of the individual liability of the corporators on the one hand and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character.

It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act

of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never at common law rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to show in *Rogers* v. *Decker* (131 N. Y. 490), but is retained by force of the express command of the statute and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily, these individual liabilities exist upon other than common law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint stock companies. Their formation destroys no part or portion of their common law liability for the debts contracted. Those debts are their debts for which they must answer. Permission to

sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required in the first instance a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common law right, but recognized its existence. We so held in *Witherhead* v. *Allen* (4 Abb. Ct. App. Dec. 628), and at the said time said that the associations were not corporations but mere partnership concerns. Even that mode of procedure has been modified by the Code (Secs. 1922, 1923), so that the creditor at his option may sue the associates without bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common law liability of associates and not to substitute for it that of corporators; and preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other the joint stock companies have been clothed with most of the corporate attributes, but enough of the original difference remains to show that our legislation, not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two.

We may thus see upon what the legislative intent to

preserve them as separate and distinct is founded and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other, the common law liability remains unchanged and unimpaired and needing no statutory intervention to preserve or restore it; the debt of the corporation is its debt and not that of its members, the debt of the joint stock company is the debt of the associates however enforced; the creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the state. The two are alike but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint stock company is a corporation, we can say as we did say in *Van Aernam* v. *Bleistein* (102 N. Y. 360), that a joint stock company is a partnership with some of the powers of a corporation. Beyond that we do not think it is our duty to go.

The order should be affirmed, with costs. All concur. Order affirmed.

LIVERPOOL INSURANCE CO. *v.* MASSACHUSETTS.

IN THE SUPREME COURT OF THE UNITED STATES, 1870.

77 United States Reports, 566.

ERROR to the Supreme Judicial Court of Massachusetts; the case being this:

A statute of the State just named imposes upon "each fire, marine, and fire and marine insurance company, *incorporated* or *associated* under the laws of any government or State other than one of the United States, a tax of 4 per cent. upon all premiums charged or received on contracts made in this commonwealth for insurance of property." The same statute imposes a tax of but 2 per cent. upon such premiums when the company is incorporated under the laws of any one of the United States other than Massachusetts; upon which premiums, where the company is incorporated by itself, it imposes but 1 per cent.; while no tax is imposed by the laws of the State upon the business of insurances transacted by any natural persons citizens of the same.

With the enactment just mentioned on its statute book, the State of Massachusetts, in 1868, filed a bill in its Supreme Judicial Court against the Liverpool and London Life and Fire Insurance Company (a company doing a large business in that State), to collect a tax of 4 per cent. on its premiums upon contracts made in Massachusetts for insurance of property, and to restrain the company from doing further business till the tax was paid. The company set up that it was not "incorporated" at all, but was an association, under the laws of Great Britain, of natural persons, some of whom were citizens and residents of the country just named; and some citizens and residents of the State of New York; formed for the purpose of conducting the business of insurance under certain deeds of settlement, and having the

legal character of a partnership; that accordingly it could not be taxed as a "company *incorporated* under the laws of any government or State other than one of the United States;" while, in so far as the discriminating tax of 4 per cent. was sought to be laid against it as a company *associated* simply and not incorporated, it violated, in regard to the members of the company who were subjects of Great Britain, a provision in the treaty of 1815, between that country and the United States, by which it is agreed that the merchants and traders of each nation respectively shall enjoy the *most complete protection and security for their commerce;* and—in regard to the citizens of New York, that provision in section 2, article 4, of the Federal Constitution which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

The Supreme Judicial Court of Massachusetts gave a decree against the company, and enjoined it from the further prosecution of its business till the taxes found to be due were paid.

The case was now brought to this court on the ground that in its application to the company the statute of Massachusetts was in conflict with the provision of the Constitution, which confers on Congress the right to regulate commerce with foreign nations and among the States, and with that which secures to the citizens of each State all the privileges and immunities of citizens in the several States.[1]

Mr. Justice MILLER delivered the opinion of the Court.

The case of *Paul* v. *Virginia* [8 Wallace, 168], decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Consti-

[1] The facts of the case as stated by the Reporter have been abbreviated, and his notes of the arguments of counsel omitted.

tution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that a corporation created by a State could exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament which enables it to sue its shareholders and be sued by them. * * *

To this view [that the association is a corporation] it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of

the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such

as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

Mr. Justice BRADLEY:

Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it is one of those special partnerships which are called joint stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

Judgment affirmed.

OAK RIDGE COAL CO. *v.* ROGERS.

In the Supreme Court of Pennsylvania, 1884.

108 *Pennsylvania Reports*, 147.

Chief Justice Mercur:[1] This action of trespass was brought under Section 1 of the Act of 8th May, 1876: *Pur. Ann. Dig.* 2000, pl. 9. The section consists of two parts. The first part declares if any person or corporation shall mine or dig out any coal, iron or other minerals, knowing the same to be upon the lands of another person or corporation without the consent of the owner, the person or corporation so offending shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, as therein provided. The other part proceeds: "And the person or corporation so offending shall be further liable to pay to such owner double the value of said coal, iron or other materials so mined, dug out or removed, or in case of the conversion of the same to the use of such offender or offenders, treble the value thereof, to be recovered, with costs of suit, by action of trespass or trover, as the case may be; and no prosecution by indictment under this Act shall be a bar to such action."

The claim was for both double and treble damages, under the second portion of the section. No question therefore arises as to the character or degree of proof necessary to convict on an indictment.

The plaintiff in error contends that it is neither a person nor a corporation within the meaning of the Act of 1876, and therefore not subject to the penalties and liabilities prescribed thereby. The fact relied on to support this view is

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[1] The Reporter's statement of the facts of the case, and his notes of the argument of counsel are omitted. Only so much of the opinion is reprinted as relates to the nature of a limited partnership under the Act of June 2nd, 1874.

that it is an association formed under the Act of 2d June, 1874, which provides for the formation of limited partnerships.

Such an association is not technically a corporation. Yet it has many of the characteristics of one. It can sue and be sued in its association name only. The longest period of its duration is fixed by the Act which provides for its existence. Like most corporations its capital (except in certain cases designated by the Act) is alone liable for its debts. The making of any division of profits which shall at the time diminish or impair the capital of the association is prohibited, and a personal liability is imposed on any manager consenting thereto. The omission to use the word "limited" may make each person participating therein personally liable for any indebtedness arising on writings executed and used in the transaction of its business. The Act further provides for a dissolution of the association, for winding up its business, and for the distribution of its property. It may not be improper to call such an association a *quasi* corporation. If not a corporation, it is a person. It is either a natural or an artificial person. There is no intermediate place for it to occupy, no other name for it to bear. It cannot claim an existence which exempts it from all liabilities imposed on either class of persons. In law the main division of persons is between natural and artificial persons. The latter class are corporations. Hence it is said in *Sedgwick on Statutes,* 372, the word "persons" includes artificial persons, corporations and *quasi* corporations. So it is declared in *Potter's Dwarris,* 283, that although parishes are neither bodies politic nor corporate or persons, yet the words every body politic or corporate, and person or persons, extend to and includes parishes.

The argument of the plaintiff in error, if sound, proves too much. If it is neither a person nor a corporation, for purposes of liability under the Act of 1876, it is not under the Act for the purpose of protecting its own property and for the recovery of damages for injury done thereto. The

same language applied to the wrongdoer applies to the party injured. It is if "any person or corporation" shall commit the illegal acts named "upon the lands of another person or corporation."

It cannot be that this statute has no application to such an association. We are clearly of the opinion that the language is sufficiently broad to subject it to the penalties therein imposed, and to give it the rights thereby secured.

Judgment affirmed.

EDWARDS *v.* WARREN LINOLINE AND GASOLINE WORKS.

In the Supreme Judicial Court of Massachusetts, 1897.

168 *Massachusetts Reports*, 564.

Trustee process. The principal defendant was described in the writ as "a joint stock company organized under the laws of Pennsylvania." The trustee, which was a Massachusetts corporation, filed an answer setting forth reasons why it should not be charged, and to interrogatories propounded by the plaintiff, made answers, the nature of which appears in the opinion. The trustee moved that it be discharged. The Superior Court allowed the motion, discharged the trustee with costs, and dismissed the action; and the plaintiff appealed to this court.

The case was argued at the bar in November, 1896, and afterwards was submitted on briefs to all the justices.

Lathrop, J.: It is conceded by the plaintiff, that, as the jurisdiction of the court depends upon charging the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee.

The question then is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the State of Pennsylvania, is a partnership or a corporation.

The trustee's answers to interrogatories refer to *Brightly's Purdon's Digest* (12th ed.), 1086-1088, and to the cases of *Eliot* v. *Himrod*, 108 Penn. St. 569, and *Sheble* v. *Strong*, 128 Penn. St. 315, as containing the law relative to the statement in the answer, that the principal defendant was a partnership, and not a corporation.

From the Digest it appears that such an association is

styled a "partnership association," and not a corporation. By the terms of the various acts which have been passed upon the subject, such an association may be formed by three or more persons. The capital is alone to be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate, and are transferable, under such rules and regulations as shall from time to time be prescribed; but if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein by a vote of the majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed twenty years.

Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds and mortgages. Land sold to the association, or by it, is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof; which service shall be as complete and effective as if made upon each and every member of such association."

In *Eliot* v. *Himrod*, 108 Penn. St. 569, 580, it is said by Mr. Justice Trunkey, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a cor-

poration, such as the right to sue and be sued, grant and receive, in the association name. But no man can purchase the interest of a member and participate in the subsequent business, unless by a vote of a majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." *Sheble* v. *Strong*, 128 Penn. St. 315, 318, is to the same effect.

If the question presented were an open one in this Commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one.

At common law, a joint stock company formed for business purposes is considered in this Commonwealth merely as a partnership. *Tappan* v. *Bailey*, 4 Met. 529. *Tyrrell* v. *Washburn*, 6 Allen, 466.

The same rule has been applied to joint stock associations formed under the laws of the State of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. *Taft* v. *Ward*, 106 Mass. 518, and 111 Mass. 518. *Bodwell* v. *Eastman*, 106 Mass. 525, 526. *Gott* v. *Dinsmore*, 111 Mass. 45, 51. *Boston & Albany Railroad* v. *Pearson*, 128 Mass. 445. See also *Frost* v. *Walker*, 60 Maine, 468; *Dinsmore* v *Philadelphia & Reading Railroad*, 32 Leg. Int. 388, 11 Phila. 483.

In *Taft* v. *Ward*, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman:

"These statutes provide, in substance, that any association, consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer; that in such suit a judgment may be rendered against the company; and until an execution is issued against the company, and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all copartnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is re-

garded as supplementary to the action against the company. *Waterbury* v. *Merchants' Union Express Co.* 50 Barb. 157. *Robbins* v. *Wells*, 1 Robertson, 666.

"So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the State of New York; for each State adopts its own forms of remedy. *Story, Confl. Laws*, Secs. 556-558. The plaintiff could not in this Commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this Commonwealth, such a company is a mere copartnership."

There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. *Phillips* v. *Blatchford*, 137 Mass. 510. See also *Hoadley* v. *County Commissioners*, 105 Mass. 519; *Gleason* v. *McKay*, 134 Mass. 419.

The case mostly relied upon by the plaintiff is *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, which was taken to the Supreme Court of the United States on a writ of error from this court. * * *[1]

This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the Supreme Court of the United States has been followed in this Commonwealth. The decisions which we have already cited show that a foreign joint stock company is considered as an association or partnership, and not as a corporation.

An examination of the statutes further shows that the Legislature has clearly recognized the distinction between foreign corporations and associations; and that where it has

[1] Judge Lathrop's recital of the facts of this case is omitted. See *supra*, page 498.

deemed it best that an act should apply to an association as well as to a corporation, it has said so in plain language. Thus the St. of 1882, c. 106, relating to the taxation of foreign mining, quarrying, and oil companies, and requiring the appointment of an agent here upon whom process may be served, uses the language, "every corporation, company, or association."

The St. of 1887, c. 214, in Sec. 1 provides: "When consistent with the context, and not obviously used in a different sense, the term 'company' or 'insurance company' as used herein includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance." The language is the same in the St. of 1894, c. 522, Sec. 1.

By the St. of 1888, c. 429, Sec. 11, "fraternal beneficiary corporations, associations, or societies," organized under the laws of another State and then doing business here, were allowed to continue business without incorporation under the act. But by the St. of 1892, c. 40, Sec. 1, this was amended by striking out the words "associations or societies."

The St. of 1884, c. 330, requires "Every corporation established under the laws of any other State or foreign country," and hereafter having a usual place of business here, before doing business, to appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom process might be served.

The St. of 1888, c. 321, allows "Manufacturing corporations established under the laws of other States," which have complied with the provisions of the St. of 1884, c. 330, to purchase and hold such real estate here as may be necessary for conducting their business.

By the St. of 1895, c. 311, "Foreign corporations engaged in the business of selling or negotiating bonds, mortgages, notes, or other choses in action," are made subject to the provisions of the St. of 1884, c. 330.

The St. of 1896, c. 391, Sec. 1, contains a provision relating to the personal liability, under certain circumstances, of "the officers and members or stockholders in any corporation established under the laws of any other State or foreign country." See also St. 1895, c. 157.

Many other instances of legislation might be given where the distinction between a corporation proper and a mere association or organization is shown to be clearly in mind.

Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extra-territorial force or effect. The trustee, therefore, was properly discharged.

In the opinion of a majority of the court, the order discharging the trustee and dismissing the action must be affirmed.

CHAPTER IX

NATURE OF THE INTERESTS OF THE ASSOCIATES IN THE COMMON PROPERTY.

SECTION 1.—PARTNERSHIP CASES.

DARBY *v.* DARBY.

In the High Court of Chancery, 1856, before Vice-Chancellor Kindersley.

3 Drewry's Reports, 495.

Alfred Darby, the father of the three infant Defendants, died intestate. A. E. W. Darby, the first Defendant on the record, was his only son and heir-at-law. The Defendants A. M. Darby and A. L. Darby were his two daughters and only other children.

This bill was filed by the administratrix of Alfred Darby for the administration of his estate, and the principal question was, what was the course of devolution of certain real estate belonging to Alfred Darby.

The state of facts was rather intricate as set out in the bill, but the substance of them, as regards the question to be decided, was this:—Alfred Darby and Abraham Darby, the last Defendant named, who were brothers, had embarked in a joint speculation as partners in the purchase of divers real estates, for which they had jointly paid or rendered themselves liable. The arrangement between them was, that these lands were bought for the purpose of converting them into building sites in plots, and reselling them at a profit. Portions of some of them were so built upon, and the ground and buildings sold. As to some of them, the legal estate had been by arrangement conveyed to Alfred Darby, and a large

portion at the death of Alfred Darby remained unsold. There was a memorandum between the Darbys and certain other persons who were their agents for the sale of the property, but it did not amount to a clear declaration of partnership, and it did not appear that there was any actual deed or written instrument or partnership between the Messrs. Darby; but it was admitted that, in fact, their arrangement and course of dealing amounted to this,—that it was a joint speculation; that they purchased the lands with their joint monies; and that they purchased them for the purpose of laying them out in building plots, to be resold for their joint profit and at their joint loss; and that they did deal with them to some extent on the footing of that arrangement. The principal question, and the only one which this report embraces, was, whether, on the death of Alfred Darby, his share of the unrealised real estate descended to his heir-at-law A. E. W. Darby, or whether it passed as personal estate to his personal representative.[1]

Vice-Chancellor: The question has generally arisen where persons, carrying on an ordinary commercial or mercantile partnership, had purchased real estate for the purpose of their trade. I have carefully considered the authorities on the subject, and the result of them appears to be this:—in *Thornton* v. *Dixon* [3 Br. C. C. 199] Lord Thurlow said, that he had always understood that where partners bought lands for the purpose of a partnership concern it was to be considered part of the partnership fund, and consequently must be considered as personalty, and distributable as such; but afterwards, the case having been further argued, his Lordship said, that if the agreement had been that the land should be valued and sold, it would have converted it into personalty; but that the agreement in the case before him was not sufficient to vary the nature of the property; therefore that, after the dissolution, the property would result according to its respective nature, the real as real, the

[1] The Reporter's notes of the argument of counsel are omitted.

personal as personal estate. In *Bell* v. *Phyn* [7 Ves. 453], and *Balmain* v. *Shore* [9 Ves. 500], Sir W. Grant decided simply on the authority of *Thornton* v. *Dixon*. Lord Eldon had the question suggested to him in several cases. In *Ripley* v. *Waterworth* [7 Ves. 425] the precise question did not arise. In *Townsend* v. *Devaynes* [1 *Mont. on Partnership*, App. 97], Macintosh and three other persons entered into partnership as paper makers, and purchased lands, on which they carried on the business. The purchase-money as to part was paid for out of the partnership capital, and part was left on mortgage of the land. The value of the premises was treated as part of the partnership stock and capital in stating the yearly balances of the partnership. Macintosh having died, his executors sold his interest in the partnership to the surviving partners. His heir claimed so much as was the value of his share of the real estate. The Master reported in favour of the heir's claim, and Lord Eldon allowed an exception to the report. This would seem to be an express decision on the point; but in Mr. Jacob's notes to Roper's Husband and Wife [1 Rop. H. & W. 346, n.] it is suggested that the decision turned on an instrument discovered after the matter had been referred to the Master, and that probably Lord Eldon's decision went on the effect of that particular instrument. In a subsequent case before Lord Eldon, *Selkrig* v. *Davies* [2 Dow. 230], the question arose as to a Scotch partnership; it does not follow of course that the law of Scotland and England are the same on this point; but in the course of the argument Lord Eldon said his own individual opinion was, that all property involved in a partnership concern ought to be considered as personal. In another Scotch case, *Kirkpatrick* v. *Sime* [5 Paterson's Scotch Appeal Cases, 525], the precise point came before Lord Eldon on a Scotch partnership; and he said, "As to all partnerships in England I think the rule is, and the better rule of decision would be, to say that the partners held the property as trustees for the creditors, and that the whole became personal estate. If the course of de-

cisions in this country had run uniformly to that effect, I should have thought it right to say that the same rule of law should prevail in Scotland. But if there have been cases in England ruled differently, I could not advise that the Courts in Scotland should adopt that which I consider the best principle of law in such a case. Till the case decided by Lord Thurlow the lawyers always considered the real estate belonging to a partnership as personal in point of succession; and we have always wished to get out of that case of Lord Thurlow's." It is impossible that any thing can be more clear and distinct than Lord Eldon's opinion as to what the law ought to be, and that Lord Thurlow's decision in *Thornton* v. *Dixon* could not be supported.

In *Stuart* v. *Marquis of Bute* [11 Ves., see p. 665] Lord Eldon said, "In cases where persons engaged in partnership have bought freehold houses, the difficulty of distinguishing and arranging property of different natures, partly personal, partly real, has never, except by the effect of the contract or the will, been held sufficient against the heir." This dictum at first sight seems to imply an assertion of the heir's title; but I think Lord Eldon only meant to intimate, that whenever the heir was entitled, his title should not be prejudiced by any difficulty that might arise in distinguishing the realty from the personalty. In *Crawshay* v. *Maule* [1 Swanst. 495] Lord Eldon said, "It has been repeatedly decided that interests in lands, purchased for the purpose of carrying on trade, are no more than stock-in-trade." And, on a subsequent day, he said, "For ordinary purposes a lease is no more than stock-in-trade, and, as part of the stock, may be sold; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock; though a question might in that case arise on the death of a partner whether it would pass as real estate or as stock, personal estate in enjoyment, though freehold in nature and quality." These are the only cases in which the matter came before Lord Eldon; and in three of them he expressed a clear opinion that the law ought to be, that where partners

purchase land for partnership purposes, it should be treated as personal property.

Then there are three cases before Sir J. Leach, and in each of these cases he held, without any doubt, that the real property became personalty, and that the personal representatives of the deceased partner had the right to his share. The first is *Fereday* v. *Wightwick* [1 Russ. & Myl. 45], and there he says, "The general principle is, that all property acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership." Now the decision in that case may be said to go only to the extent of determining that it is partnership property as among the partners. But in *Phillips* v. *Phillips* [1 Myl. & K. 649] Sir J. Leach said, "I confess I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have to every intent the quality of personal estate; and, in the case of *Fereday* v. *Wightwick*, I had no intention to confine the principle to the payment of partnership demands."

The third case, before Sir J. Leach, is *Brom* v. *Brom* [3 Myl. & K. 443], which was a decision to the same effect, between the trustees and the personal representative of the deceased partner.

There are also three cases before Sir. L. Shadwell. In *Randall* v. *Randall* [7 Sim. 271]—[His Honor referred to the facts of the case]—the Vice-Chancellor held that the share of the deceased partner in real estate was not converted into personalty. In *Cookson* v. *Cookson* [8 Sim. 529], the Vice-Chancellor also held that the property in question, which was freehold, remained freehold property; but in the last case before Sir L. Shadwell, of *Houghton* v. *Houghton* [11 Sim. 491], he decided otherwise, and, from the judgment in that case, it is evident that Sir L. Shadwell consid-

ered that if the facts were such that the real estate *had become partnership property*, it would assume the nature and character of personal estate. And I conceive that the reason why he decided the two previous cases otherwise was, that in those cases he did not consider that the property had become partnership property.

The result, then, of the authorities may be thus stated: —Lord Thurlow was of opinion that a *special contract* was necessary to convert the land into personalty; and Sir W. Grant followed that decision. Lord Eldon on more than one occasion strongly expressed his opinion that Lord Thurlow's decision was wrong. Sir J. Leach clearly decided in three cases that there was conversion out and out; and Sir L. Shadwell, in the last case before him, clearly decided in the same way. That is the state of the authorities.

Now it appears to me that, irrespective of authority, and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out.

What is the clear principle of this Court as to the law of partnership? It is, that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie. This principle is clearly laid down by Lord Eldon in *Crawshay* v. *Collins* [15 Ves. 218], and by Sir W. Grant in *Featherstonhaugh* v. *Fenwick* [17 Ves. 298], and the right of each partner to insist on a sale of all the partnership

property, which arises from what is *implied in the contract of partnership*, is just as stringent as a *special contract* would be. If, then, this rule applies to ordinary stock-in-trade, why should it not apply to *all* kinds of partnership property? Suppose that partners, for the purpose of carrying on their business, purchase, out of the funds of the partnership, leasehold estate, or take a lease of land, paying the rent out of the partnership funds, can it be doubted that the same rule which applies to ordinary chattels would apply to such leasehold property? I do not think it was ever questioned that, on a dissolution, the right of each partner to have the partnership effects sold applies to leasehold property belonging to the partnership as much as to any other stock-in-trade. No one partner can insist on retaining his share unsold. Nor would it make any difference in whom the legal estate was vested, whether in one of the partners or in all; this Court would regulate the matter according to the equities. And Sir W. Grant so decided in *Featherstonhaugh* v. *Fenwick*.

If, then, the rule applies not only to ordinary stock-in-trade, but also to a lease for years,—suppose next, that the partnership, instead of purchasing a term of years, were (whether from necessity or choice) to purchase land in fee; if the land is necessary for the partnership business, and bought with the partnership assets, what difference can it make whether the real estate bought is leasehold or in fee? Let it be once established that the property purchased is partnership property, and it then comes under the operation of those principles which arise out of the partnership contract; and there seems to be no reason why the operation of those principles is to be restricted to any particular class or species of partnership property. The observations of Lord Eldon in *Crawshay* v. *Maule*, before referred to, show that in his opinion the right to a sale on a dissolution of partnership does not in any degree depend on the nature of the property. Nor could it be material in this case, any more than on the purchase of a leasehold interest, in whom the legal estate was vested.

I should, therefore, feel no hesitation in coming to this conclusion, that the mere contract of partnership, without any express stipulation, involves in it an implied contract, quite as stringent as if it were expressed, that, at the dissolution of the partnership, all the property then belonging to the partnership, whether it be ordinary stock-in-trade, or a leasehold interest, or a fee simple estate in land, shall be sold, and the net proceeds, after satisfying all the partnership debts and liabilities, be divided among the partners; and that each partner, and the representatives of any deceased partner, have a right to insist on this being done.

Next, what is the doctrine of this Court as to conversion? If a testator seised of real estate devises it for sale, and directs that the proceeds of the sale shall be divided among certain persons, so that each of the *cestuis que trust-ent* is entitled to say he will have it sold, and will take his share of the proceeds, that real estate is in equity converted into personalty; and so, if three persons contract that certain real property belonging to them shall be sold, and the proceeds be divided among them, so that each one of them has a right to insist that it shall be sold, and that he shall have his share of the proceeds *as money*, that real property is in equity converted into personalty, and if any one of them dies while the property remains unsold, his share is personalty as between his heir and his personal representatives.

Now if it be established that, by the contract of partnership, all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that, not merely as between the partners, to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner.

That this is so, I should, in the absence of all authority, have decided upon principle; and when I find, notwithstanding the decision of Lord Thurlow, followed by Sir W. Grant, that Lord Eldon was clearly of opinion that real

property purchased by a partnership for partnership purposes, and with the partnership funds, becomes personalty; that Sir J. Leach repeatedly so decided without any doubt; and that Sir L. Shadwell also decided the last case in the same way,—I can have no difficulty in coming to the conclusion, that whenever a partnership purchase real estate *for the partnership* purposes, and with the partnership funds, it is as between the real and personal representatives of the partners personal estate.

Now this case is not the ordinary case, where persons carrying on the ordinary business of a commercial or manufacturing partnership have found it necessary to purchase real estate for partnership purposes. That is not the case; here they bought land as the stock-in-trade, by the sale of which they were to make their profits;—the land was not in the nature of plant, but was the very subject-matter of their trade. Does that make any difference? If it does, I think it is in favour of treating it as converted; because the real estate is here clearly put in the same position as ordinary stock-in-trade; and it appears to me that if I entertained more doubt than I do on the general question, that doubt would, in this case, be very much diminished by the circumstance, that here the real estate is itself bought for the very purpose of selling it again. The very intention of the partnership was to buy land to resell it. That is their very contract, and, without selling the land again, there would be no partnership business,—the partnership was for the purpose of buying land to parcel it out in plots, and to sell them again, and each partner had a right to say he would have that contract carried out. We have here what Lord Thurlow wanted in *Thornton* v. *Dixon*, an actual contract that the land shall be sold.

I must, therefore, decide that the share of A. Darby was personal estate, and passed to his personal representatives.

SHEARER *v.* SHEARER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

98 *Massachusetts Reports,* 107.

BILL IN EQUITY by the administratrix of Leonard B. Shearer, to compel the conversion, and division as personalty, of real estate, bonds for the conveyance of real estate, and proceeds of real estate by way of rent or sales since the death of the complainant's intestate, remaining as the property of certain partnerships of which he was a member, after the settlement of their affairs.[1]

WELLS, J.: A former bill, brought by the same party, substantially for the same purposes as the present, was dismissed on the ground that the right to adjust the affairs of the subsidiary partnerships of Shearer & Paine, and Shearer & Jones, and to receive the net results thereof due to the original partnership of L. B. & D. L. Shearer, belonged to D. L. Shearer, as the survivor of that firm. 12 Allen, 289. Since then, the affairs of those subsidiary partnerships have been closed, and the respective shares of Paine and Jones assigned, or designated to be assigned to them; the debts of the several partnerships have been fully paid, and all partnership balances have been adjusted and paid. The personal property sufficed to repay all that remained due of the original capital of the plaintiff's intestate and of D. L. Shearer; and the balance of personal property has been divided between the plaintiff and D. L. Shearer, according to their respective rights under the partnership articles. That which remains, to which the prayer of this bill applies, consists of real estate, bonds for the conveyance of real estate, and proceeds of real estate, by way of rent and of sales, since the

[1] The Reporter's notes of the arguments of counsel are omitted.

decease of the plaintiff's intestate. Of this balance, the estate of L. B. Shearer is entitled to two-thirds, and D. L. Shearer to one-third. The distribution of this balance has been agreed upon by designating the several parcels and amounts to be assigned for the share of each party. This arrangement has been agreed to by all parties interested, but with the express proviso that it shall not prejudice the plaintiff in any of the rights which she claims by this bill, namely, to have the share of her intestate conveyed to her as administratrix, or sold and the proceeds paid over to her.

This claim of the administratrix is not founded upon the rights of creditors; and apparently there are no creditors to require the conversion of the real estate. Some reliance is placed upon a special agreement or declaration between Shearer and Paine, in regard to lands previously acquired by that firm; but we do not see in that writing any indication of purpose other than that all lands so acquired should be for the benefit of the parties in proportion to their interest in the copartnership, and not according to the state of the legal title.

The plaintiff's claim must rest, and is mainly placed by the argument of her counsel, upon the general rule that has been affirmed by some authorities elsewhere, that, as between the heir and the personal representative of a deceased partner, the real estate of the partnership is to be regarded in equity as personal estate. Some special facts, as to the location and legal title of the lands in question, are relied upon to strengthen the equitable considerations in favor of the widow in this case.

In *Wilcox* v. *Wilcox,* 13 Allen, 252, it was held that where, after all debts and balances between the partners are satisfied, there remains real estate of the copartnership, in which the legal title of each partner corresponds to his interest or share in the partnership, equity will not interfere for the purpose of converting such real estate into personalty. In the present case the legal title does not correspond with the beneficial interests of the several partners. Not only

are the shares of the partners unequal under the partnership agreements, but much of the real estate is held without regard to the beneficial interest, either in the sole name of Paine, or otherwise, as convenience suggested at the time of purchase.

Assuming that the force of the decision in *Wilcox* v. *Wilcox* is to be limited to the precise state of facts there presented, the question now is whether its principle extends to cases where a proper adjustment of the rights of the partners is not secured by descent of the legal title, but requires the voluntary recognition or judicial determination of equitable rights more extensive than the legal title. That decision proceeded upon the ground that the application of the principles of implied trusts to the real estate of partnerships constituted the whole foundation and the origin of the doctrine of equitable conversion; and that those trusts are to be administered solely for the purpose of enforcing the obligations and securing the rights of the partners, as between themselves. When the legal title is held by one partner in excess of his beneficial interest, it is held in trust for the purposes of the partnership, and is chargeable, in equity, with all obligations growing out of that relation. Against such party, and against his widow and heirs, equity will interpose to secure to his copartners their actual beneficial interest.

Neither the ground of interposition nor the mode of its exercise is changed by the decease of the party in whose behalf it is required. His representatives are substituted in his place. Their rights are derivative merely. Equities between them, if any there be, are subordinate and posterior to those which spring from the relation of copartnership. The conversion of real estate into personalty is worked, if at all, for the purpose of adjusting the affairs of the partnership. It would seem, therefore, that the conversion should be made only when and so far as required for that purpose; and that the effect upon the descent or distribution of the share of a deceased partner among his representatives should

be regarded as incidental merely, and not an end for which the interference of a court of equity is to be sought.

In this view of the grounds and purpose of such equitable conversion, even regarding all partnership real estate, however the legal title may be held, as held in trust for the partnership, this court are disposed to hold, notwithstanding the great weight of authority to the contrary elsewhere, that such real estate is to be converted into personalty only when such conversion is required for the payment of claims against the partnership which are in the nature of debt. Balances due to individual partners, for advances to the firm, or for payments made in its behalf, come within this definition. So also may capital, furnished by one partner, when by the terms upon which it was furnished, or from the nature and necessity of the case, it is to be repaid in specific amounts, in order to reach the net result, or body of the partnership interests, to which the proportional rights or shares of the several partners attach. In short, whatever is required to be paid or measured in precise sums must be so adjusted; and real estate, converted for that purpose, undoubtedly becomes personalty, and is to be distributed as such when paid over to the party entitled. But the shares in the body of the partnership property, those interests which are not measured by precise amounts, but consist in a common proprietorship after all special claims are satisfied, stand upon different footing. These interests are determined by the proportions fixed by the articles or organic law of the partnership. When the beneficial interests and the legal title correspond, it has already been decided that the rights of the partners in real estate so held will be left to adjust themselves by the descent of the legal title, with its incidents, as real estate of the several partners, held in common. *Wilcox* v. *Wilcox*, *ubi supra*. When the legal title is otherwise held, it is held in trust; and the equitable title descends in like manner and with like incidents, except as to dower. The office of equity in such case is merely to declare the trusts, and compel the legal title to serve the equitable inter-

ests. This is accomplished by directing such conveyances as will make the legal title of the several parties conform to their respective beneficial interests.

By the rule above indicated, all partnership rights and obligations are secured, and all equities growing out of that relation are met and answered. To require equitable interference to go further, and convert all real estate into personalty, for the mere purpose of a division, seems to us to be an unnecessary invasion of the rights of the copartners, and, when undertaken in the interest of one class of the representatives of a deceased partner, against another class of representatives of the same partner, it seems to be a departure from the legitimate sphere of equitable jurisdiction. It is not the province of equity to seek to counteract or modify the operation of the laws of descent and distribution.

The widow's right of dower in her husband's interest in partnership real estate, is not held subject to the payment of his private debts. As a general fact, this incident makes dower a more valuable interest than the distributive share of the widow would be if the real estate were to be converted. But we do not regard that circumstance as of any weight in determining the general rule against such conversion. On the other hand, in our view, the special facts, which, in the present case, would make it more advantageous for the widow that the partnership realty should be converted into personal estate, furnish no ground for such conversion. The equitable powers of the court are not called into exercise for the settlement of the estate of the deceased partner.

There are no equities between heirs and distributees, under our laws, which can call into exercise or quicken the powers of the court for the conversion of realty into personalty. We do not understand that, in the English courts, any such supposed equities have ever been made a ground for the doctrine of equitable conversion, as held there. In the case of *Cookson* v. *Cookson*, 8 Sim. 529, such a ground of interference was emphatically discarded. That case, however,

is not one in which the full extent of the English doctrine was asserted.

Conversion into personalty is not necessary to enable creditors of the individual partner to secure payment of their debts out of the share of their debtor in real estate held in copartnership. By our laws, all property of a debtor, whether personal or real, is liable for payment of all his debts. Creditors therefore require no equitable interposition, except such as may be necessary for the assertion of the rights of the partner himself. Their rights are secured, in respect to real estate held in copartnership, through the equities which pertain to their debtor. In this particular the laws of England differ. The inheritance there, being exempt from liability for debts by simple contract, it is only by conversion and payment of the proceeds to the personal representatives of a deceased partner that his private creditors can receive payment out of such property. How far, if at all, this consideration may have been influential in determining the extent to which the doctrine of equitable conversion should be carried, and in establishing the right of the personal representative to require it to be made in his favor, we are unable to judge. The cases in which the personal representative of a deceased partner has been held entitled to enforce this right against the heir, do not indicate, so far as we have been able to examine them, whether it is done in behalf of creditors or of distributees. The doctrine, however, seems now to be fully established, without regard to the consideration whether there are private creditors or not. *Darby* v. *Darby*, 3 Drewry, 495. This may perhaps be regarded as the most natural result of the rule holding such property liable for the payment of all partnership obligations, when it is considered how far that liability deprived partnership real estate of the fixedness and permanency of ownership which characterize the inheritance in realty there.

We cannot dismiss the subject without adverting to some of the considerations upon which the rule of conversion

"out and out" is maintained in the case last cited, and which have been pressed in the argument before us.

One reason for such conversion is said to be, that courts know no mode of estimating the property, and making division of the shares between the partners, except by sale and reduction to money; and, furthermore, that one partner has no right to claim, and cannot be required to accept, his share of the capital or profits in the form of an undivided interest in specific property. But this assumes the whole question. In relation to personal property, there is a practical difficulty in this respect. The law recognizes it, and, upon the death of one partner, vests the whole title in the survivor. Even during the continuance of the copartnership, one partner may transfer the entire title of the firm by sale of any of its personal property in the course of its business. In regard to such property, the rule that it is to be in all cases converted into money is undoubtedly well established and entirely uniform everywhere. In this, equity follows the analogies of the law. On the other hand, neither partner can convey the interest of his copartner in real estate. The law provides for its transmission in undivided shares; for its partition; for its descent to the heirs of a deceased partner. It seems to us best to accord with the general principles of equitable interference that equity should recognize the division of real estate held by copartners as already effected by operation of law, unless and except so far as the terms of the copartnership and the state of the accounts require its interposition in order to make the legal title conform to the equitable or beneficial interest. When this is accomplished, equity has no longer any office to perform towards it.

Again, it is said "that the mere contract of partnership, without any express stipulation, involves in it an implied contract quite as stringent as if it were expressed, that, at the dissolution of the partnership, all the property then belonging to the partnership, whether it be ordinary stock in trade, or a leasehold interest, or a fee-simple estate in land, shall be sold, and the net proceeds, after satisfying all the

partnership debts and liabilities, be divided among the partners; and that each partner and the representatives of any deceased partner have a right to insist on this being done."

In our view, there are several objections to such an implication of agreement, as the foundation of a rule of equitable conversion. In the first place, it seems necessary to assume in the outset that such is the established rule, and that parties are to be presumed to become partners in reference to its operation, in order to predicate such an inference from the mere fact of engaging in a joint business. It would be especially difficult, without such assumption, to find a pretext for the inference, where the parties have entered into written articles and omitted all provision of that character. If the inference of such an agreement is to be made as part of the transaction of purchasing real estate with partnership funds, for partnership use, it is equally inconsistent with the failure to express such a term in the deed of conveyance. The inconsistency is even greater than that; for, by the express terms of the deed and by the well known operation of law, the estate is limited to the heirs of the several copartners, whose estate is, at law, the ordinary one of tenants in common.

In the second place, conceding the agreement as supposed, either express (provided it be not in writing) or implied, it is not such a contract as entitles the parties to a specific performance, and it does not create the trust required for the conversion of real estate. The statute demands a written agreement for that purpose. Gen. Sts. c. 100, Sec. 19. The English statute seems equally to require it.

The implied trust, which is enforced in equity for the adjustment of partnership obligations, results from the investment of the funds of the partnership in the real estate in question, for the use of the partnership. Regarding it in that light, the court have but to inquire to what use the funds, represented in the land, are devoted; to whom and in what proportions the beneficial interests belong; and the execution of the trust will follow according to the nature of the rights

to be secured. It is not necessary to resort to inventions to work out the equities of the case through some implied contract, or supposed intentions of the parties in entering into the relation of partnership, or in applying it to the ownership of land. The ordinary, well known and generally recognized principles of equity, as applied to trusts resulting by implication of law, are sufficient for all the requirements of that relation. We are satisfied that the principles which we have indicated apply equally to every condition in which the legal title may be placed, and to every degree and proportion of interest to which the several partners may be entitled.

It was the right of the surviving partner to apply partnership funds for the liquidation of any obligations of the firm, and for the discharge of all liens upon the joint property. The payment of money to release partnership real estate from incumbrances which existed thereon at the time of its purchase, although not a debt which they were otherwise bound to pay, was in accordance with the rights and interests of the copartners, as such, and might properly be done as a part of the adjustment of the partnership affairs, before division. We do not see that the plaintiff, either as widow or as administratrix, can claim to have such real estate interest converted back again into personalty.

The bonds, or contracts for the purchase of real estate, may properly be fulfilled; and, if fulfilled by a conveyance according to their terms, or if specifically enforced, the rights of the widow and heirs in the land thereby acquired attach in the same manner as if the land had been conveyed in the lifetime of the deceased partner. *Reed* v. *Whitney*, 7 Gray, 533.

The conclusion to which we have come is in the direction towards which all the decisions upon the subject hitherto, in Massachusetts, have clearly pointed. It is sustained by the able and elaborate opinion of Chancellor Walworth, in *Buchan* v. *Sumner*, 2 Barb. Ch. 198; by the case of *Tillin-*

ghast v. *Champlin*, 4 R. I. 173-207; and by several other American authorities. See 1 Am. Lead. Cas. 494.

The real estate to which Leonard B. Shearer would be entitled as his share of the copartnership property, to wit, that which has been designated to be conveyed or released to his representatives, will therefore be conveyed or released to his heirs, subject to liability for the payment of his private debts, if any, and subject also to such rights of dower as Corinna A. Shearer may be entitled to have in the several parcels, under the laws which exist where such real estate is situated. But this disposition cannot be ordered in the present suit, which seeks a conveyance to Corinna A. Shearer herself, or a sale for the purpose of placing the proceeds in her hands as administratrix. It is a proceeding against the heirs, and not in their behalf. The bill must therefore be dismissed.

FOSTER'S APPEAL.

IN THE SUPREME COURT OF PENNSYLVANIA, 1873.

74 Pennsylvania Reports, 391.

APPEAL from the Orphans' Court of Allegheny County.

SHARSWOOD, J.: The question raised upon this record may be thus concisely stated: When real estate has been held as partnership stock—the firm dissolved by the death of one of the members—a settlement and balance ascertained to be due by the surviving partner to the estate of the deceased, is such balance as far as derived from the sale of the realty to be distributed as real or personal estate? The appellant, who is the widow of John Foster, deceased, who was a copartner of Samuel M. Kier in the firm of Kier & Foster, claims that she is entitled to one-third of the interest of the said Foster, as ascertained by the settlement, absolutely as personal estate; the decree of the Court below awards it to her for life only as realty. The firm property at the time of Foster's death was composed both of lands and movables. They were engaged in the mining and selling of coal. The appellant, as administratrix, and William W. Young, as guardian of the minor children of John Foster, presented a petition to the Orphans' Court of Allegheny county, setting forth "that at the time of his death, the said John Foster was an equal partner with Samuel M. Kier, in the firm of Kier & Foster, engaged in the mining and selling of coal, the property of the said firm being situated in the county of Allegheny; that while in many instances the real estate belonging to the said firm was conveyed to them as tenants in common, yet the same was really held by and purchased with the money of the firm as partnership property; that the said firm of Kier & Foster were largely indebted; that Kier, the surviving partner, had proposed to purchase the interest of Foster for the sum of

twenty-five thousand five hundred and eight dollars and thirty cents, he, the said Kier, assuming all the debts and liabilities of the firm; that it would be greatly to the advantage of all interested that the interest of Foster should be sold at private instead of public sale, and the proposition of Kier accepted; that they unite in the petition for the purpose of removing any question which may arise from the fact that several of the said properties have been conveyed to the said John Foster and Samuel M. Kier as tenants in common, and not expressly as partners." Upon this petition the Orphans' Court decreed a private sale to Samuel M. Kier, for the sum named, and that the proceeds of sale be treated and considered as the proceeds of real estate, and accordingly distributing and applying the purchase money between the widow and heirs of decedent. It is from this latter part of the decree that this appeal is taken.

It has not been and cannot be denied, upon the appraisement and settlement of the partnership debts and assets which accompanies the petition, that after discharging all the liabilities of the firm, the interest of Foster in the lands and real estate which formed the most considerable portion of the stock was fairly represented by the sum agreed to be paid for his entire interest. It is the well settled rule in marshalling the assets of a decedent, that the personal property is to be first applied in the payment of debts. The general principle is that the personal estate is the proper fund for that purpose, and shall be first applied even to the payment of debts with which the real estate is charged: Keysey's Case, 9 S. & R. 71; Walker's Estate, 3 Rawle 237; Cadbury *v.* Duval, 10 Barr 273. This is indeed the unbending rule of our statute law, for no order can be made by the Orphans' Court authorizing an executor or administrator to make sale of real estate for the payment of debts unless it shall appear that the personal assets are insufficient for the purpose: Act of February 4th, 1834, sect. 20, Pamph. L. 80; Act of March 29th, 1832, sect. 31, Pamph. L. 198. It is true that it may often happen that

where personal property is used in connection with a colliery or manufacturing establishment, it is very much for the interest of all parties that it should be sold together. That is a difficulty which seems inherent in the subject—equally applicable to the property of any decedent—not peculiar to one whose property is an interest in partnership stock. It seems to be considered as well settled, that where land is a part of partnership stock, it at no time—not even during the continuance of the partnership—becomes personalty in such an unqualified sense as to give one partner an implied power to dispose of the whole partnership interest in it. As regards the power of disposition, land held as partnership stock is not subject to the rule which makes each partner the agent of the firm. Neither can sell more than his own undivided interest, unless he have from the other a sufficient special authority for the purpose. This seems to be the inevitable result of the Statute of Frauds, both as to legal and equitable interests or estates: *Murphy* v. *Hubert,* 7 Barr 423; *Anderson* v. *Tompkins,* 1 Brock. 457; *Tapley* v. *Butterfield,* 1 Metc. 515. It follows that the surviving partner could not sell the real estate in conjunction with the personalty. When such a difficulty presents itself, it must be met either by a separate sale of the personalty, or in the mode resorted to in this case. Here we have practically no difficulty growing out of the necessary intermixture of realty and personalty.

For all the purposes of the question before us, this case must therefore be considered the same as if after dissolution by the death of one partner, and payment of all partnership debts, and any balance due the surviving partner, there had remained *in specie,* unconverted, land, the interest of the deceased partner in which is ascertained to be worth $25,508.30. Is the land thus remaining unconverted and *in specie* to be regarded for the purposes of distribution under the intestate laws, as real or personal?

This is an entirely new question in this state. It was supposed to arise in *Meily* v. *Wood,* 21 P. F. Smith 488,

but this court thought otherwise, and distinctly declined to express any opinion upon it. A careful examination of all our determinations has failed to discover either decision or even *dictum* bearing upon the point. Even Abbott's Appeal, 14 Wright 234, which has been pressed upon us as an authority, is inapplicable. In that case, although the balance of a fund in court arising from the sale of partnership real estate on an execution against the firm, was awarded to the surviving partners as against the claim of one of them in his own right, and as the executor of a deceased partner, to aliquot shares; yet as stated in the decree, these surviving partners were "settling the business of the firm," and it is said in the opinion by Mr. Justice Read, that "the business of the firm, dissolved by the death of George Abbott, has never been finally settled, and it is alleged by the appellees that the firm is still largely indebted." We approach the determination of the question, therefore, untrammelled by any authority. Nor will it be necessary to pass in review the fluctuating and discordant opinions in England and our sister states. We are saved this labor by the learned and exhaustive opinion of Chancellor Walworth, in *Buchan* v. *Sumner,* 2 Barb. Ch. 165. We are at entire liberty to resolve this important and interesting problem on principle and reason.

Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit equitas* has redoubled force in application to it. It follows of necessity, that it is limited to its end. Lord Eldon advanced this idea while his mind was evidently laboring and in suspense on the general subject. In *Ripley* v. *Waterworth,* 7 Ves. 425, he said: "There is an obvious difference from all the cases, which establish this general principle, that where a person dealing upon his own property only, has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when

the purpose fails, the intention fails; and this court regards him as not having directed the conversion." There must be some purpose recognized as lawful to be accomplished by a conversion, before equity will permit it to have place. Surely it will not be pretended that a man could by a mere declaration of record convert his land into personalty, so as to defeat the lien of mortgages, judgments and other encumbrances, elude the provisions of the Statute of Frauds, and change the course of distribution in case of intestacy. If, however, a trust is created, either by deed or will, with an absolute direction to sell and distribute the proceeds either among creditors or others, equity considers that as actually done which has been directed to be done, in order to accomplish the lawful intent of the grantor or testator. If it continued land, subject as such to sale, mortgage and encumbrance by the eventual distributees—the present *cestuis que* trust—the result aimed at might be defeated, and the intention frustrated. So where land is, by the agreement of the partners, made partnership stock, it is an out-and-out conversion only, because otherwise the objects of the partnership would be defeated, if the sale, mortgage or encumbrance of his separate interest by one partner could prevent the equity of the other partners to have the partnership property applied to the payment of the partnership debts, and the balances which might be due to them respectively. When the purpose of conversion is attained, conversion ends, or more accurately, re-conversion takes place. Thus when the sale under the trust is made, the character of personalty does not follow the land into the hands of the purchaser. The proceeds are personalty and are distributed at such among the *cestuis que* trust, because that was the very object of the conversion. So with land in partnership when sold by the firm, the land becomes land again in the hands of the purchaser, and the proceeds personalty, but personalty to what extent? Only to the extent of accomplishing the purposes of the conversion, namely, the equity of the partners to have the joint debts and their own

advances paid before any part goes to the other partners or their separate creditors. In *Dyer* v. *Cornell,* 4 Barr 359, where, by order of the Orphans' Court, the land of minors was sold for their maintenance and education, it was held that the proceeds, supposing them to retain the character of land, lose that and become personalty on the first transmission, though to an infant. The administrator of the minor was decided to be entitled to the money as money. The Court, indeed, were of opinion that the sale *ipso facto* worked a transmutation, but they added, by Coulter, J., "But even admitting that the money in this case bore the impress of real estate, and the inheritable qualities peculiar to lands and houses, in analogy to the case of *Lloyd* v. *Hart,* 2 Barr 473, for how many generations or descents shall it wear that complexion? It must cease as it mingles with other moneys of the distributee, otherwise uncertainty, confusion and litigation will indelibly mark its character. This court is of opinion that it cannot be carried further than the first descent in any case." The same question is pertinent in regard to the land in the present case. If land, remaining *in specie* after the partnership is dissolved and wound up, and all the purposes of its conversion answered, is still personal estate, how long is it to remain so? Certainly all the forms of the law as to realty must be observed in its transmission from hand to hand, and shall it not be subject to the lien of judgments in the lifetime, and debts upon the decease of its owner? If not, uncertainty, confusion and litigation will indelibly mark its character. But it may be asked, when is the precise moment of its reconversion? The answer is, the moment the partnership is wound up, either by decree, judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. In *Burr* v. *Sim,* 1 Whart. 252, where land was ordered to be converted by will, and the proceeds to be paid to a legatee, it was held that the election by the legatee before any sale, to take the land as land, operated as a new acquisition. It was a pur-

chase of it as land by a surrender of the right which he undoubtedly had to consider it as money. Where, then, a partnership is dissolved, wound up, and completely ended, what can it be but an election of the land as land, and the reconversion of it?

It must be remarked, also, that without the order of the Orphans' Court in this case, the legal title of John Foster to an undivided moiety of the lands could not have been conveyed to Samuel M. Kier. We have seen that this is a well settled point. If it were not so, the appellant as administratrix might have assigned it. She joined in the application to the Court with the guardian. The decree for the private sale was under the provision of the Act of April 18th, 1853, sect. 4, Pamph. L. 505; and the fifth section of that act has declared that, in all cases of sale according to its provisions, "The purchase money * * * shall in all respects be substituted for the real estate sold * * * as regards the enjoyment and ownership thereof, after the payment of liens, and shall be held for or applied to the use and benefit of the same persons, and for the same estate and interest * * * as the real estate sold had been held." Under the express provision of the statute, the proceeds of the real estate sold under this order must be considered as of the same character as the land remaining *in specie* after discharging its liabilities as partnership stock. On the whole, then, we are of the opinion that the appellant was only entitled to an interest for her life, and that the decree of the Court below was right.

Decree affirmed, and appeal dismissed at the costs of the appellant.

LEAF'S APPEAL.

In the Supreme Court of Pennsylvania, 1884.

105 *Pennsylvania Reports*, 505.

This was an appeal of Richard T. Leaf and others from a decree of the said court, sustaining a bill in equity for an account filed by Emanuel V. Gerhart against the said Richard T. Leaf and others, and decreeing that the said defendants pay the plaintiff the sum of $1,500 with interest. Answers were filed, and the court appointed Daniel H. Wingerd, Esq., examiner and master, whose findings of fact and conclusions of law were as follows:

In 1852, Frederick S. Hunter and others entered into a partnership for the purpose of manufacturing pig iron at Leesport, Pa. Among the articles of copartnership were the following:

"2. The furnace property in Leesport, real estate in and about Leesport, and all other stocks and properties necessary for the safe and profitable management and enjoyment of the business heretofore purchased for the partnership, or that may hereafter be purchased or constructed for the same, shall be taken and held as partnership personal property."

"6. The firm shall not be dissolved by the death, withdrawal, failure or pleasure of any of its members, nor in any way but by the consent of all the members thereof. . . . In the case of the death of any member, his legal representatives shall hold his property and interest, in the same manner and subject to the same rights and liabilities as the deceased partner held the same, and may sell out and withdraw from the firm, as provided in the case of withdrawal of a partner. By the term legal representatives, is understood and intended the person or persons who may be made such, touching this property, by the last will of the

member deceased, or who may become such, under the intestate laws of this Commonwealth."

When this copartnership was first formed, its real estate consisted of what was then known as the Darrah Furnace Stack and several acres of land connected therewith; but other real estate was subsequently purchased from time to time until the entire holdings by the partnership aggregated about 270 acres, upon which are erected houses, barns and various other kinds of buildings, suitable for farming and furnace purposes. All the real estate thus acquired was bought for the use of the partnership, and paid for out of their general funds, to further the interests of the firm, and while much real estate was acquired which was not really needed for the manufacture of iron, properly speaking, some part of each purchase, in the judgment of the partners, was needed, for the better or more convenient management of the main business of the firm; and what was not absolutely necessary for that purpose, was bought with the necessary portion, in order to get that which was needed.

On August 20, 1863, Frederick Hunter died intestate, possessed, *inter alia*, of a one-fifth interest in said partnership, and leaving surviving him a widow, Mary M. Hunter, and three children, viz., Nicholas Hunter, Lenora C. Leaf, wife of Richard T. Leaf, and Mary M. Flinn, wife of J. Robinson Flinn. Letters of administration on his estate were duly granted to Wm. H. Clymer, Esq.

On August 22, 1865, the widow of Frederick S. Hunter was married to Emanuel V. Gerhart, the plaintiff, and on July 18, 1866, she died. By her last will and testament she bequeathed to the said Emanuel V. Gerhart "all the personal property which I own or am possessed of at the time of my decease, including my share in the 'Leesport Furnace Property' in Berks county, Pennsylvania, being one-third of one-fifth thereof." The said Emanuel V. Gerhart, her husband, was appointed as executor in the will,

and on the 30th day of July, 1866, letters testamentary were issued to him accordingly.

Thereafter dividends declared by the partnership were paid to him from time to time, upon the said one-third of one-fifth interest until the last dividend declared on the 8th day of November, 1879, and payable on the 1st day of January, 1880, when the children of Frederick S. Hunter made objection to the payment of the same, as formerly, to the said Emanuel V. Gerhart. This objection was put upon the ground that the widow of Frederick S. Hunter had only a dower interest in the one-third of his share in the Leesport Iron Company, and that therefore the same descended to them as his heirs, at her death, and did not pass by her last will to the said Emanuel V. Gerhart, and that therefore said dividend was payable to them as such heirs.

Thereupon the firm declined to pay the said dividends to either of the claimants, and this bill was brought by the said plaintiff against Richard T. Leaf, *et al.*, members of said firm or heirs of the said Frederick S. Hunter, to enforce payment of the same to him as the legatee of the widow of Frederick S. Hunter, deceased.

On these facts the auditor reported as follows: The English authorities incline strongly to the doctrine, that real estate held by a partnership and used for its purposes, is converted into personalty, and as such goes to the personal representatives and not to the heir at law: *Collyer on Partnership*, Secs. 114-15, and cases cited in notes. In this country the rule, in many of the states is held to be different from the English doctrine, though there is conflict of authority on the subject, and in this state the decisions show a decided tendency toward restricting the application of the equitable doctrine of the conversion of realty held by a partnership into personalty, and to admit it only for the accomplishment of equitable results. It is, however, the well settled rule in Pennsylvania, that when real estate is brought into the partnership business, and forms part of

its stock, it is considered personalty, and as converted out and out for all purposes of the partnership, except sale and conveyance under the Statute of Frauds: *Meily* v. *Wood*, 21 P. F. S., 488; Abbott's Appeal, 14 Wright, 234; *Foster* v. *Barnes*, 31 P. F. S., 377; Foster's Appeal, 24 P. F. S., 391.

"In the case before us there can be no doubt that all the real estate acquired by the partnership, both before and after the death of Frederick S. Hunter, formed part of the assets of the partnership, as the recorded agreement so stated; the conveyances are all made *in terms* for the use and benefit of the partnership, and the evidence is that all except the first purchase was paid for out of the profits of the partnership. Certainly then, under the authority of Foster's Appeal, 24 P. F. Smith, 391, and the facts above stated, it must be held that in this case there was an out and out conversion from realty to personalty, to the extent that the real estate held by the partnership was not subject to lien by the creditors of Frederick S. Hunter, or any other individual member of the firm, nor to sale, mortgage, or encumbrance either by him, or any one else who succeeded to his interest in the partnership, but remained liable, first, for the payment of all partnership debts, and secondly, for the payment of any balances which might be due to the other members of the firm. Under the same authority it is equally clear, that had the partnership been wound up and dissolved, upon the death of Frederick S. Hunter, all its affairs settled, and a balance ascertained to be due to his estate, such balance, arising from the real estate, would have been re-converted, as no longer forming a part of the partnership stock, nor required for its purposes, and would have descended to his widow and children, as real estate. But in the case before us the partnership could not be dissolved nor its affairs wound up, by the death of Frederick S. Hunter, and as a matter of fact, it was not wound up nor affected in any way thereby; but on the contrary continued its business just as before his death, and his interest re-

mained in the partnership subject to all its purposes, and was represented by his widow and the guardians of his three minor children, who stood in his stead as partners.

"What then must the interest of Frederick S. Hunter be considered during this continuing partnership with his widow and children, either by their guardian or themselves as members thereof, and with their entire interests subject to the equities of partnership creditors and the other partners—whether realty or personalty for the purposes of descent? . . . Indeed it does not appear, though the firm paid large dividends, how much would have remained for distribution, either of personalty or realty, if the affairs of the firm had been wound up, and certainly all the partnership stock, whether realty or personalty in fact, must remain liable, primarily, for all partnership obligations, and be considered personalty until all partnership affairs have been fully wound up and settled. In Abbott's Appeal, 14 Wright, 234, the balance of a fund in court arising from a sale of partnership real estate was awarded to the surviving partners as against the claim of an individual partner in his own right, and as the executor of another deceased partner, on the ground that the affairs of the firm had never been finally settled. See also Foster's Appeal, 24 P. F. S., 391.

"Now applying these principles, as laid down, to the case in hand, we conclude: That as the land formed a part of the partnership stock it was converted out and out, because the objects of the partnership required it, and being converted into personalty in contemplation of law, it could not be reconverted until that partnership was wound up and settled, and until it was finally determined by such settlement, that it was no longer required for the purposes of the partnership. But the partnership in question never has been wound up, and under the terms of the agreement its affairs may not be finally settled for an indefinite period; nor does it appear but that the entire interest of which Frederick S. Hunter died seised, may in the future be, or

might at any time heretofore have been, required for the purposes of a final settlement and winding up of the partnership affairs. How then can re-conversion take place until the equities which work the conversion are accomplished and settled? How could this undefined and still undefinable interest in the partnership descend as real estate, and as such, be chargeable with a dower interest and subject to all the possibilities of sale, mortgage, or incumbrance by those entitled to the remainder, without interfering with the equitable rights of partnership creditors and partners, and defeating the very object of conversion? All the partnership property in this case being clearly impressed with the character of personalty, any attempt to withdraw that character from it, during the existence of the parnership or before accomplishing the equitable objects for which the conversion into personalty was effected, would not only defeat those objects, but lead to a state of uncertainty and confusion respecting the rights of partners, creditors and heirs, and would, in the opinion of the master, be contrary to sound legal principles. It may be noticed further that as both the widow and children of Frederick S. Hunter allowed their several interests to remain in the partnership, and thereby became partners under the 6th clause of the agreement above quoted, it seems impossible to escape the conclusion that if their interest, by any mode of reasoning, could be held to be real estate, at any period since the formation of the partnership, re-conversion into personalty must have again taken place, for it will not be pretended that those interests, or any of the others in the partnership now, may be considered other than as personalty for all equitable purposes.

"As, therefore, the widow took her portion of the interest of Frederick S. Hunter in the partnership as personalty, she took it absolutely, and had the legal right to bequeath it to Emanuel V. Gerhart, the plaintiff, as she did. He, by virtue of the provisions of the 6th clause of the partnership agreement, elected to remain in the partnership

and become a partner, and is consequently entitled to be paid his proper share, according to his interest, of all dividends declared by the partnership since the death of the widow, and not yet paid to him."

The master accordingly recommended that the bill be sustained in accordance with the prayer of the plaintiff. * * * Exceptions filed by the defendants to the master's findings of fact and law were dismissed by the court and the report was confirmed. * * * The defendants thereupon took this appeal.[1]

Mr. Justice GREEN delivered the opinion of the court, April 28, 1884.

The decree made by the learned court below in this case merely ordered the payment of the sum of fifteen hundred dollars by the defendant to the plaintiff, as his full share of a dividend of profits declared in 1879. There was no decree of dissolution of the partnership asked for in the bill or made by the court; there was no final account nor any winding up of the affairs of the partnership. Of course there was no adjudication either of the status of the parties or of their respective rights to the property of the partnership, as upon a final settlement and distribution of the property and assets of the partnership. The money ordered to be paid was a share of a dividend of the current profits of the firm. The profits realized from the business were of course personal property in any aspect of the case. They represent, not the mere product of real estate distinctively as such, but of a business, to wit, the manufacture and sale of pig iron. Such a business is perhaps quite as largely the result of a dealing with money and personal chattels as with real estate. In this case the furnace and lands occupied in conducting the business were owned by the members of the firm, and to the extent of their use they contributed to the general result of profits earned.

The partnership in which the parties plaintiff and de-

[1] The facts as stated by the Reporter are slightly abbreviated, and his notes of the arguments of counsel omitted.

fendants were interested, was a continuing one which commenced in 1852, and which has never yet been dissolved. No question as to the ultimate ownership of the real estate of the firm, after a dissolution has taken place, arises upon the present record. The articles of copartnership contained an express provision that the firm should not be dissolved by the death, withdrawal, failure or pleasure of any of its members, nor in any way but by the consent of all the members thereof. A method of continuing the partnership after the death of a member is also provided. That such stipulations are perfectly valid and binding cannot be doubted: *Story on part.*, Secs. 196 to 201; *Gratz* v. *Bayard*, 11 S. & R., 46; *Laughlin* v. *Lorenz*, 12 Wr., 282, and authorities cited by Agnew, J., on p. 283.

In the present case, in addition to the provision for a continuance of the partnership after the death of a member, there is also a stipulation that the furnace and lands of the firm shall be held as personal property. In point of fact the real estate of the firm was acquired with partnership funds and used for partnership purposes. In every view of the case so far as any question which now arises is concerned, during the continuance of the partnership agreement, all the property of the firm must be regarded as personal estate. Certainly this must be so as to mere dividends of profits earned in carrying on the business. We cannot declare the partnership contract at an end, nor can we dissolve the firm, or deal with its assets as though it were dissolved, by any order which it would be possible for us to make in this proceeding. We have considered the very able argument of the learned counsel for the appellants with great care, but we are not convinced that it is applicable to the present situation in its leading points. The decision in Foster's Appeal, 24 P. F. Smith, 391, much relied upon for the appellants, is predicated of a dissolved firm, with all its debts paid, and a residuum of unconverted land remaining *in specie* for mere purposes of distribution. But there are no such facts here. It cannot now be known that

the real estate will not be required for the payment of debts. The firm still continues its business under a lawful agreement to that effect. Whenever a dissolution shall be established, and a final settlement of accounts shall take place, the positions contended for, and the reasoning by which they are enforced, will become entirely applicable, and will exercise a very potent, and possibly a controlling influence, upon the questions which will then arise between the present litigants or those who may succeed them. But upon the present state of the record we think the appellee is clearly entitled to the dividend in question as the successor to his deceased wife's title.

Decree affirmed at the cost of the appellants.

SECTION 2.—CORPORATION CASES.

RUSSELL *v.* TEMPLE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1798.

3 *Dane's Abridgment*, 108.

IN this case the heirs of Thomas Russell contended that his shares in Malden, Charles River, Haverhill, Andover, and Merrimack bridges, in Middlesex canal &c., ought to be considered as real estate, and his widow, afterwards married to Temple, ought to have only her dower for life in them. On the other hand, Temple and wife contended they were personal estate, and ought to be distributed as such, and she have one-third part forever. The strongest case among these, in favor of real estate, was the Middlesex canal, in which the corporation had a fee simple estate, or an estate forever, and a perpetual toll. By the statutes passed respecting this canal and real estate, the property therein was divided into 800 shares, and the shares in the canal, including the towing paths and wharves thereon, were made transferable and taxable as personal estate. This corporation also had power to hold real estate to the amount of £30,000, over and above the canal itself, and this appendant real estate was made taxable as real estate of the corporation in the several towns in which it lay. It was argued (for the widow) that these shares were personal estate for two reasons: 1st. Because these estates can only exist in the corporation, which alone can acquire it, alone be seized or possessed of it, alone pass it away, manage or repair it, and so must hold it entire; and that the corporation is a moral person to all the purposes of property. Its tenure is to their successors, or to their successors and assigns; these estates never can vest in or be divided among the individual mem-

bers, to hold as tenants in common &c., in their private capacities. Only the corporation can forfeit the estate, and that only by forfeiting their charter; and only the corporation can be taxed for it on common law principles; and on these can it alone be taken in execution for the debts of the corporation; and on a dissolution of the corporation, "its lands revert to the grantor, or his heirs, and the debts due to or from it are totally extinguished; so that the members of it cannot recover or be charged with them in their natural capacities." And a grant to a corporation can only be for its life or continuance. 2 Bl. Com. 484; 1 Lev. 239; 1 Bac. Abr. 510. Second. Because the share is personal estate, though the corporation hold real estate; for the individual member has no estate, but only a right to such dividends as the corporation, from time to time, assign to him. He is unknown on the grants made to it, and he cannot grant any part of the estate; nor can he be taxed for it but by statute law; nor can any private member of a corporation be distrained for a public concern of it; his only remedy for his dividend is case in *assumpsit,* or an action on the case for a wrongful refusal or neglect to pay or allow him his part of the profits. 4 Wood's Con. 489, &c.; Cowp. 85; *Impey's Modern Pleader* 83; 1 Vent. 351; *Dutch* v. *Warren;* 1 Stra. 406; same case 2 Burr. 1011.

So lands may be real estate in one, yet the trees or corn growing on them may be personal estate in another. *Lifford's Case,* 6 Co. 46 to 50; Imp. M. P. 167.

For the heirs, it was urged that these shares were real estate; because it was said the estates were real in the corporations; annexed to the soil; and that if these estates in the corporations were real, the estates of the individual members in them followed their nature, and were real; and that the frequent declarations of the legislature declaring such shares personal estate, at least shew a doubt: that when one has a right to receive rent, he has only a right to receive a sum of money; yet it does not follow that his estate is not real estate, out of which his rent issues. The judgment

of the court was, that these shares were personal estate, and distribution was ordered accordingly. The principal reason of the decision appears to be, because the court considered that the individual member, or share-holder, had only a right of action for a sum of money, his part of the net profits, or dividends. And so the law has been held to be since this decision was made.

TISDALE *v.* HARRIS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1838.

20 *Pickering's Reports*, 9.

ASSUMPSIT by the plaintiff, an inhabitant of New York, against the defendant, a merchant of Boston, on a contract alleged to have been made in October, 1835, by which the defendant agreed to sell to the plaintiff two hundred shares, with all the earnings thereon, in the capital stock of the Collins Manufacturing Company, a corporation established in Connecticut, at $10.80 per share, the par value being $10 per share. The object of the suit was to recover $300, being the amount of a dividend of 15 per cent on the two hundred shares, declared on the 7th of October, 1835, and payable on the 15th.

At the trial the plaintiff introduced parole evidence to prove the contract. A verdict was returned for the plaintiff, which the defendant moved to set aside, one two grounds, one of which being that the contract set up was within the Statute of Frauds.[1]

SHAW, C. J.: But by far the most important question in the case, arises on the objection, that the case is within the statute of frauds. This statute, which is copied precisely from the English statute, is as follows. "No contract for the sale of goods, wares or merchandise for the price of ten pounds (33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and

[1] Only so much of the facts of the case as stated by the Reporter, and the opinion of the Court as relate to the fact of the case are reprinted.

signed by the parties to be charged by such contract, or their agent, thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring State, for the price of more than ten pounds, and no part having been delivered, and no purchase money or earnest paid, the question is, whether it can be allowed to be good, without a note or memorandum in writing, signed by the party to be charged with it. This depends upon the question, whether such shares are goods, wares or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the St. 29 Car. 2, in the same terms, which ours has copied, has not been definitely settled in England. In the case of *Pickering* v. *Appleby,* Com. Rep. 354, the case was directly and fully argued, before the twelve judges, who were equally divided upon it. But in several other cases afterwards determined in Chancery, the better opinion seemed to be, that shares in incorporated companies, were within the statute, as goods or merchandise. *Mussell* v. *Cooke,* Prec. in Ch. 533; *Crull* v. *Dodson,* Sel. Cas. in Ch. 41.

We are inclined to the opinion, that the weight of authorities, in modern times, is, that contracts for the sale of stocks and shares in incorporated companies, for more than ten pounds, are not valid, unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheaton, 89, note; 3 Starkie on Evid. 4th Amer. Edit. 608.

Supposing this a new question now for the first time calling for a construction of the statute, the Court are of opinion, that as well by its terms, as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise," are both of very large signification. *Bona,* as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including in general, objects of traffic and com-

merce, is broad enough to include stocks or shares in incorporated companies.

There are many cases indeed in which it has been held in England, that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and thence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal, and coercive, and tended to deprive a man in trade of all his property. But most joint stock companies, were founded on the hypothesis at least, that most of the shareholders took shares as an investment and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man could not be deemed a merchant so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question.

The main argument relied upon, by those who contend that shares are not within the statute, is this. That statute provides that such contract shall not be good &c., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication, the statute applies only to goods, of which part may be delivered. This seems however to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods &c. shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature it cannot apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restric-

tions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the terms goods, as they are within the reason and policy of the act, the Court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action. As to the argument, that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and cannot therefore be relied upon to show a cause of action when the action was commenced.

Verdict set aside and plaintiff nonsuit.[2]

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[2] *Compare* the following discussion in *Humble* v. *Mitchell,* 11 Adolphus and Ellis, 205, 1839. The question was whether a contract for the sale of shares in an English joint stock banking property was a contract falling under the 17th Section of the Statute of Frauds. The company was a partnership with transferable shares. Cresswell and Crompton for the plaintiff: "There is an essential difference between the language of Sec. 72 of the Bankrupt Act, 6 G. 4, c. 16, and of Sec. 17 of the Statute of Frauds. The words of the former are 'goods and *chattels;*' those of the latter are 'goods, wares, and merchandizes.' The word 'chattel' is more comprehensive than any word used in the Statue of Frauds, and has been construed to include debts, bills, bonds, policies of insurance, and shares in a joint stock company, all of which pass to the assignees when in the possession, order, or disposition of the bankrupt; *Hornblower* v. *Proud* [2 B. & Ald. 327]. Here no stock, goods, or tangible property passed to the plaintiff, but only a right to participate in the partnership profits, from whatever source those profits might be derived. A mere right of action is a chattel within the Bankrupt Act; but the merchandizes within the meaning of the Statute of Frauds must be such as are capable of part delivery. The owner of a share is not necessarily entitled to any of the real or personal estate or property of the company; or, if he is, the defendant has not proved it."

Lord Denman, C. J.: "The other point is whether the shares in this company are goods, wares, or merchandizes, within the meaning of Sec. 17 of the Statute of Frauds. It appears that no case has been found directly in point: but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction

between the words used in the Statute of Frauds and in the Bankrupt Act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon the latter act cannot be reasonably extended to the Statute of Frauds. Shares in a joint stock company like this are mere choses in action, incapable of delivery, and not within the scope of the 17th Section. A contract in writing was therefore unnecessary."

In this opinion Patterson, Williams and Coleridge, JJ., concurred.

CHAPTER X

VOLUNTARY AND INVOLUNTARY ALIENATION OF INTERESTS IN THE COMMON PROPERTY.

SECTION 1.—PARTNERSHIP CASES.

HEYDON *v.* HEYDON.

In the Court of King's Bench, 1693.

1 *Salkeld's Reports, 392.*

Coleman and Heydon were co-partners, and a judgment was against Coleman, and all the goods both of Coleman and Heydon were taken in execution: And it was held by Holt, C. J., and the Court, that the sheriff must seize all, because the moieties are undivided, for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

EDDIE *v.* DAVIDSON.

In the Court of King's Bench, 1781.

Douglas's Reports, 627.

The defendant was partner with one Birnie, against whom a commission of bankrupt had issued, but before the bankruptcy, the plaintiff had sued out execution on a bond of the defendant's, for 700*l.* and the sheriff had levied on the partnership effects. Birnie's assignees obtained this rule, to show cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an affidavit of Birnie's, that he was entitled to an equal share of the partnership effects, as partner with Davidson. The plaintiff's affidavit, on showing cause, denied that Birnie had an equal share in the partnership effects, and stated that he had embezzled the joint stock to a considerable amount.

The court directed that it should be referred to the Master to take an account of the share of the partnership effects to which Birnie was entitled; and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.

TAYLOR *v.* FIELDS.

In the Court of Exchequer, 1799.

4 *Vesey, Junior's Reports,* 395.

The point in this cause depended upon the general question, whether a separate creditor of one partner can hold the partnership effects, taken under an execution for his separate debt, against the joint creditors of the partnership.

At the time the execution took place the partnership was insolvent; but a commission of bankruptcy had not then issued.

Sir Archibald MacDonald, Chief Baron, delivered the opinion of the Court.

The right of the separate creditor under the execution depends upon the interest, each partner has in the joint property. With respect to that we are of opinion, that the *Corpus* of the partnership effects is joint property; and neither partner separately has any thing in that *Corpus;* but the interest of each is only his share of what remains, after the partnership accounts are taken.

In *Skipp* v. *Harwood,* [1 Ves. 239, by the name of *West* v. *Skip:* 2 Swanst. 586], we see, that whatever the right of the partnership may be, it is not affected by what may happen between the individual partners. There is a distinction between the rights of the partners and the rights of the partnership. As between one partner and the separate creditors of the other they cannot affect the joint stock any farther than that partner, whose creditors they are, could have affected it. In *Fox* v. *Hanbury,* Cowp. 445, Lord Mansfield was led to the consideration of a point, that bears much upon this case; and adverting to the case of *Skipp* v. *Harwood* he states a passage of Lord Hardwicke's judgment from his own note rather stronger than it appears in the Report: "If a creditor of one partner takes out execu-

tion against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner."

What is the manner, in which the debtor himself had it? He had that, which was undivided, and could only be divided by first delivering the effects from the partnership debts. He who comes in as his companion, as joint tenant with him, according to this doctrine of Lord Hardwicke must take it in the same manner the debtor himself had it, subject to the rights of the other partners.

Lord Mansfield having stated what according to the course of the Common Law, as far as it respects trade between partners, is the rule, that a creditor taking out execution against a partner is directly in the place of the partner debtor, proceeds to show, that by the same rule, where a partner becomes bankrupt, the assignees are put in the place of the partner, in whose right they come in, and by no means, as was argued by Mr. Plumer, by any rule arising out of the bankrupt laws; for nothing is said in any one of those Acts as to the creditors of a partnership and the separate creditors of one partner. But the same Common Law applied in the case, where one partner becomes a bankrupt, provides, that the assignee of the bankrupt shall be in the same situation as that, in which a creditor taking out execution stood before those Acts. This introduces all the cases of bankruptcy; which Mr. Plumer wished to exclude, as not applicable to a case, in which there was no bankruptcy; and this case is to be considered, as if no bankruptcy had taken place; as the execution was before the bankruptcy. In law there are three relations: first, if a person chooses for valuable consideration to sell his interest in the partnership trade; for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference: but in all those cases the application takes place of the rule.

that the party coming in the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner; and it is an *item* in the account, that enough must be left for the partnership debts.

A great deal has been said of the inconvenience. What is the inconvenience? It is true, the individual trusted to the partnership fund in his idea at the time he was lending the money: not that I believe, that is very common. But it may be dangerous in a thousand instances to have any thing to do with a trader; as, for instance, to purchase an estate; for an act of bankruptcy may have been committed five years before, which will reach the estate. But look to the danger on the other side: one partner giving a bond; and the creditors of the partnership looking to the stock itself. It is said, that in this case the joint creditors had done nothing; and this meritorious creditor has a right to be preferred on account of his early diligence. But what is that, to which he is entitled? The estate of a partner is debtor to him. The question therefore recurs to the consideration, what it was that partner had; for the creditor cannot be entitled to any more. It therefore argues nothing to say, he has the merit of diligence, till we see, upon what that merit can attach. If the partner himself therefore had nothing more than an interest in the surplus beyond the debts of the partnership upon a division, if it turns out, that at Common Law that is the whole, that can be delivered to, or taken by, the assignee of a partner, the executor, the sheriff, or the assignee under a commission of bankruptcy, all, that is delivered to the creditor, taking out the execution, is the interest of the partner in the condition and state he had it; and nothing was due to this partner separately, the partnership being insolvent. The whole property was due to the partnership creditors, and not to either partner.

LORD v. BALDWIN.

In the Supreme Judicial Court of Massachusetts, 1828.

23 Massachusetts Reports, 348.

This was an action of the case against the defendant, a deputy sheriff for neglecting to levy an execution in favor of the plaintiff against John Brown, upon certain goods which had been attached by the defendant, upon the original writ, as the property of Brown. Brown carried on business in his own name alone, and the goods were in his shop as stock in trade. Before the plaintiff attached, there had been three attachments of the same goods in favour of W. Lawrence, the Dorchester Iron Company and Aaron Brown, in suits against John Brown alone; in which suits judgments were obtained and executions were duly issued and delivered to the defendant. Soon after these attachments, by the consent of all parties, the goods were sold by the defendant pursuant to law. The defendant paid to Lawrence and the Dorchester Iron Company the amount of their respective executions, and to Aaron Brown a certain sum in part satisfaction of his execution; retaining in his hands enough of the proceeds to satisfy that execution in full, and the plaintiff's execution in part.

After the foregoing attachments, Bogart & Co. sued out their writ of attachment against John Brown and Aaron Brown, charging them as *copartners,* and on this writ the defendant attached the same goods as copartnership property. On the trial of the action, upon the question of copartnership, Bogart & Co. obtained a verdict, and judgment was rendered in their favour against John and Aaron Brown; and the defendant was notified to hold the proceeds of the stock to satisfy the judgment.

The debt upon which the judgment in favour of Bogart

& Co. was rendered, arose from the sale of goods to John Brown, and the goods made part of the stock in the store; and the other debts, except the one due to Aaron Brown, arose in the same way; it being unknown that a copartnership existed between John and Aaron Brown.

If the court should be of the opinion that the existence of a dormant partnership, unknown to all the parties who dealt with John Brown, did not give Bogart & Co. priority of security upon the goods as partnership property, the defendant was to be defaulted.[1]

PARKER C. J. delivered the opinion of the Court. The question presented in this case is entirely new; no authorities have been cited, nor have we been able to find any which bear very strongly upon it.

The plaintiff made the third attachment upon the goods apparently belonging to John Brown, to secure his debt.

The defendant had sufficient funds in his hands, the proceeds of the goods attached, to satisfy the judgment in this suit, in whole or in part, if he is not obliged in law to appropriate them to the satisfaction of another judgment obtained by Bogart & Co. against John and Aaron Brown, who made their attachment on the same goods, after the attachment made by the plaintiff; and the right of priority is supposed to be in Bogart & Co., because John and Aaron Brown are found to be partners, having a joint interest in the stock of goods which were attached, upon the principle that the partnership fund is to be applied to the payment of partnership debts, before a separate creditor of one of the firm can be allowed to resort to it for satisfaction of his debt. The principle is well settled, having been first applied to cases of distribution under commission of bankruptcy. But it is a reasonable principle, and has been adopted and enforced by this Court in the case of *Pierce* v. *Jackson*, 6 Mass. Rep. 242, and is there said to be a principle of the common law.

[1] The Reporter's notes of the arguments of counsel are omitted.

It is only the application of this principle to cases as they arise, which can afford any room for argument or doubt; and in order to determine such question, the reason of the rule must be sought for, and the particular case must be brought within the reason, as well as within the terms of the law.

The basis upon which the rule rests is, that those funds shall be liable upon which the credit was given. Those who sell goods or make contracts with a company or firm, are supposed to trust to the ability or property of the firm. Those who trust the individual member, rely upon his sufficiency alone. The former are equitably entitled to be first paid out of the joint stock, and if after paying all the debts there is still a surplus, that is the property of the individuals in proportion to their interest in the common fund, and to that extent only is it liable to the creditor of the individual. In the case of common public partnerships there is no difficulty in applying the principle, and in case of bankruptcy or insolvency it is the fair mode of distribution of the effects.

But the case before us is that of a dormant partnership, which is necessarily, from its very character, unknown at the time the liability is incurred. All the creditors sold their goods or made their contract with the ostensible, visible partner: they trusted to him personally, and to the goods upon which he was trading as his. The dormant partner is brought to light by *ex post facto* investigation, and he is made responsible, not because he was trusted, but because he secretly enjoyed the profits of the business. Now in such case, the reason for giving preference to such creditors as may first discover his liability, so that stock ostensibly belonging to the visible partner shall first be applied to the satisfaction of their debts, does not exist. Even if he owned the whole of the stock, as between him and the known man of business still it is in law the property of the latter, for he is allowed to claim and use it as

his alone, and thus lead persons to trust him upon the faith of the goods in his possession.

Whether a private creditor of his could seize property so situated and hold it against the creditors of the ostensible owner, is a question of a different nature.

The question now is whether, when all the creditors have trusted the man of business and apparent owner of the goods, any one of them who is behind the rest in his attachment, shall supplant them and gain priority because he has discovered this concealed liability. At the time the debt was created, he stood upon the same footing with the rest; he trusted John Brown and the goods in his possession; so did they. They have taken possession first of the fund which was held out to the public as the means of credit, and it might be, and probably was in this very case, that the goods attached are the identical goods which they sold to the party sued. There would be then no pretence of equity and we think not of law, in allowing a preference founded upon no meritorious distinction of circumstances.

That this question has not arisen before, is owing perhaps principally to the fact, that most of the dormant partnerships have been such as have resulted from a loan of money to be employed in the partnership concerns, where the receipt of a part of the profits of the business has been the compensation for the loan. The silence of the books themselves seems evidence of the unsoundness of the doctrine now sought to be applied. It is considered that the mere fact of liability as a partner does not give an interest or ownership in the stock in trade; the whole may have been purchased for and in the name of the visible partner, and it usually is so in cases of dormant partnerships. The property then is not the dormant partner's to the prejudice of those who trust him who carries on the business and obtains the credit. *Ex parte Enderby,* 2 Barn. & Cres. 389; *Smith* v. *Watson, ibid.* 401; *George* v. *Clagett,* 7 T. R. 359, 361, note.

So far as the cases of dormant partnership have been

discussed, the opinions advanced have been of a contrary tendency. Thus an action may be maintained by the ostensible partners, without joining a dormant partner, against a person who dealt only with the ostensible partners. Montagu, 182; *Leveck* v. *Shaftoe,* 1 Esp. Rep. 468. This shows that whether the action is to be affected or not, depends upon the parties with whom the contract is made.

So in an action brought by ostensible and dormant partners, the defendant may set off a debt due from the ostensible partner only. Montagu, 182; 7 T. R. 359; *Lloyd* v. *Archbowle,* 2 Taunt. 324.

In the case of *Curtis* v. *Perry,* 6 Ves. 747, the following case is stated by the Lord Chancellor as having occurred, though there seems to be no report of it. Three persons, partners in a manufactory in Lancashire, sold their goods in London in the names of two of them only. A credit therefore was acquired by them all in Lancashire, and by two in London, which affected the distribution of their property. And in 2 Barnw. & Cres. 401, it is said, if a secret partnership could be set up as an answer to assignees claiming property which had been left in the order and disposition of the bankrupt, as apparent owner, enormous debts, unconnected with the partnership business, might be contracted upon the credit gained by the possession of property, which a person wholly unknown to the creditors might claim, to the exclusion of their just demands.

Finding therefore that this is a first attempt to maintain the preference which is sought for in this action, that the meritorious ground of preference in other cases does not here exist, and that the analogical reasoning upon cases which have been decided is against the defendant, we are of opinion that the plaintiff is entitled to recover of the deputy sheriff so much as remains in his hands of the proceeds of the property attached, after satisfying the execution of Aaron Brown.[2]

Cammack v. *Johnson,* 2 N. J. Eq. 163, 1839. (C *et al.* secured judgments against B, levied on property in B's possession and the Sheriff

was about to sell the same, when A brought a bill in equity setting forth that he, A, was a dormant partner of B; that the partnership was indebted to A; that he, A, believed that the debts due by B to C *et al.* were in whole or part the individual debts of B. The prayer of the bill was for an injunction to restrain the sale of partnership property, on account of the partnership, and the appointment of a receiver. The answer of C *et al.* denied all knowledge of the partnership. On appeal, injunction dissolved. See *contra: Witter* v. *Richards, infra, Doner* v. *Stauffer,* note 2.

DONER v. STAUFFER.

In the Supreme Court of Pennsylvania, 1829.

1 *Penrose and Watts' Reports*, 198.

Writ of error to the Court of Common Pleas of Lancaster county.

This was a feigned issue, directed by that court, and joined between the defendants in error, who were the plaintiffs below, and for whom the verdict passed, and the plaintiffs in error, who were the defendants below.

It appeared from the evidence in the cause that Daniel Howry and Benjamin B. Eshelman entered into partnership in a manufacturing establishment, under the firm of Howry and Eshelman. They became considerably indebted. Judgments were entered and executions were issued against each of them. Abraham Doner, Samuel Herr, John Howry and Samuel Howry had severally judgments against Daniel Howry, on each of which an execution issued against him, and was levied on the 9th of August, 1825, on the personal property of Daniel Howry and Benjamin B. Eshelman as partners in trade.

John Stauffer, Christian Breckbill and Jacob Eshelman had severally obtained judgments against B. B. Eshelman, on each of which judgments an execution was issued against him and levied on the 11th day of August 1825, on Benjamin B. Eshelman's share of the personal property of Benjamin B. Eshelman and Daniel Howry, as partners in trade. By virtue of these and other executions, the personal property of the firm was sold for the sum of $5070.39, which, after payment of the costs, left a balance of $4779. This balance was paid into court for distribution.

On a rule obtained by the counsel of Stauffer, Breckbill and Eshelman, to show cause why the one-half of the proceeds of the sale of the firm property should not be applied

to the satisfaction of their executions against B. B. Eshelman, the court decided that the execution-creditors of Benjamin B. Eshelman had a legal right to his share of, and interest in the partnership effects of the firm of Howry & Eshelman, as it stood on the 11th August 1825, when the executions were levied; and directed this issue, to try what that share or interest was.

The plaintiffs claimed a moiety or half part of the $4779 as their share.

The plaintiffs having closed their evidence, the defendants, in support of the issue taken in the cause, offered to prove that the firm of Howry & Eshelman was entirely insolvent on the 11th August 1825; that the debts and claims against the said firm existing on the said 11th August 1825, which were then unpaid, greatly exceeded the whole property of the said firm; that Benjamin B. Eshelman, on the said day, had no interest whatever in the said firm, and that Daniel Howry, the other partner, is greatly interested in the application of the funds of the said firm to the payment of the debts of the said firm, as he is answerable, individually and as a partner, for the whole of the said debts. Which offer being objected to, the court overruled the same, and delivered the following opinion, to wit: "I am satisfied that the authorities cited settle the law as it applies to the cases decided, that is to say, to cases where there are separate executions against one partner levied on the partnership effects. But this is a case where the whole partnership effects are swept away by separate executions against each partner, where the creditors at large have no lien. I must say that the principal object in directing this issue was, as it was a case of great importance, to give an opportunity of completely considering and reviewing the law on the subject. But I am very clear that Benjamin B. Eshelman's interest, or want of interest, cannot be shown by evidence of debts due from the firm, and that the testimony offered relative to the insolvency of the firm, and the interest of Daniel Howry in the application of the

funds of the firm to the payment of its debts, cannot be admitted."

To this opinion, overruling the evidence offered, the defendants excepted.

Although the issue joined was between the separate execution-creditors of the respective partners, the counsel for the defence appeared for the joint-creditors of the firm, to controvert the right of the separate creditors of Eshelman, to be paid out of the fund in court, before the joint-creditors were satisfied; and they alleged that after the executions of the separate creditors were levied, Howry & Eshelman had made an assignment to trustees, for the benefit of the creditors of the firm.

The only question now raised in this court, upon the charge of the court below, and the bill of exception, was, whether the separate execution-creditors of Eshelman had a right to be paid out of the proceeds of the sales of the goods of the firm, before the joint-creditors were satisfied out of that fund.[1]

Gibson, C. J.: It is settled by a train of decisions in the American, as well as the British courts, that the joint effects belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts; and consequently, that no greater interest can be derived from a voluntary assignment of his share, or a sale of it on execution. That a contract which enables the parties to keep a class of their creditors at bay, and yet retain the indicia of ownership, should not have been deemed within the Statutes of Elizabeth, is attributable exclusively to the disposition universally manifested by courts of justice to encourage trade. But such as it is, has the contract of partnership been established; and the principle which enables the partners to pledge to each other, the joint effects as a fund for payment of the joint debts, has introduced a preference in favor of the joint creditors, founded on no merits of their own, but

[1] The Reporter's notes of the arguments of counsel are omitted.

on the equity which springs from the nature of the contract between the partners themselves. The author of the Commentaries on American Law, vol. 3, p. 38, attributes this preference to an inherent equity in the joint creditors themselves, arising from a supposed acquisition of the partnership effects from their means. The opinions of Chancellor Kent are so justly entitled to deference that no prudent judge will differ from him without hesitation; yet I cannot but adhere to the opinion I expressed in *Bell* v. *Newman*, 5 S. & R. 92, that in cases of insolvency or bankruptcy, in which alone the question of priority can be material, the joint effects consist of the wreck of the capital originally embarked. Under a joint commission, by which the effects pass to the assignees, while the partners are personally discharged, I admit, that the preference of the joint creditors has no other foundation, if it has any at all, than this supposed inherent equity; and the best elementary writer on the subject so disposes of the difficulty: Gow on Partnership 341-2. But in the case of a separate commission, Lord Eldon expressly puts it on the particular equity of the partners themselves, *Ex parte* Ruffin, 6 Vesey 126, and in the case of an execution, Chief Baron McDonald does the same: *Taylor* v. *Fields*, 4 Vesey 396. To secure the firm from the extravagance of its members, by preventing the capital from being withdrawn from the purposes of the partnership, the stock is pledged for the burden which, from the nature of the connection, is to be borne by all; but in moulding the law of partnership to its present form, the credit gained by giving the joint creditors a preference, was, if an object at all, a very remote one. Accordingly, with the single exception of a joint commission, we find that wherever the partners are not individually involved, the joint creditors have no preference whatever; as in the instance of a bona fide assignment of the effects, to one of the partners, after the partnership has been dissolved.

In consequence of the rule as I have stated it, a sep-

arate execution-creditor sells, not the chattels of the partnership, but the interest of the partner, encumbered with the joint debts; and the joint creditors therefore have no claim to the proceeds. To allow them the proceeds, and recourse to the property in the hands of the purchaser, would subject it to a double satisfaction. Neither can they take the proceeds or the property at their election. They can interfere at all, only on the ground of a preference which has regard only to the partnership effects, and these have not been sold, but only the subordinate interest of the partner, which was, strictly speaking, his separate estate. Their recourse, therefore, is necessarily to the property in the hands of the purchaser. Now, had the sheriff sold the interest of but one of the partners, the execution-creditor would have clearly been entitled to the proceeds. But although he sold the whole stock at one operation, on separate executions against both, there was, in contemplation of law, a separate sale of the interest of each. What then would have been the effect, had these sales been made consecutively? The first, in the order of time, would have passed the interest of the partner, subject to the equity of his co-partner, and the execution-creditor would have been entitled to the price. But this equity, together with the remaining interest of the other partner, would have passed by the succeeding sale to the same purchaser; the execution-creditor, in that instance, also taking the proceeds. Can it make a difference, then, that instead of being consecutive, these two sales were simultaneous? A curious question might arise, whether separate purchasers of the shares respectively, would stand in the relation of partners, so as to enable the joint-creditors to follow the goods. It seems to me they would not, because not personally involved in payment of the debts.

Here, however, where the shares of the partners are united in the same purchaser, every semblance of partnership-equities is at an end. As regards the goods in the hands of the purchasers, this is conceded; but the joint-

creditors insist that the proceeds are to be substituted for the goods, and subjected to the same equities. That might be done if the proceeds belonged to the partners; but it is not easy to imagine how they are to be treated as the owners of money raised by a sale on executions against them. For what purpose should the ownership of it be vested in them, even for an instant? Not to give the joint-creditors a preference, for that would make the rights of the partners depend on the claims of the joint-creditors, who, on the contrary, can claim nothing but by virtue of the lien, where there is one, of the partners.

To say that the partners have such a lien because the joint-creditors have an equity, and that the joint-creditors have an equity because the partners have a lien, would be to argue in a circle. Here the partners cannot be prejudiced in respect of their claims on each other, the advantage to be gained from an application of the joint effects to their separate debts, being mutual and equal. The consequences are precisely the same, as if the effects had been sold on execution against both. We are, therefore, of opinion that the joint-creditors can not interpose; and consequently, that the rejection of the evidence, as well as the direction to the jury, was substantially right.

I have considered the question on principles applicable to it, in analogy to well settled parts of the law of partnership, rather than on authority bearing directly on the point. But, since this opinion was drawn, my brother Huston has directed my attention to the case of *Brinkerhoff* v. *Marvin*, 5 Johns. Ch. 300, which is direct to the point; so that independent of analogies, we have an authority on which we might safely rule the cause. But both principle and authority are adverse to the preference claimed; and the issue, therefore, was correctly found for the plaintiff.

Judgment affirmed.[2]

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[2] *Compare: McNutt* v. *Strayhorn*, 39 Pa. 269, 1861. (A and B were partners. A assigned all his interest in the firm assets to C for the

benefit of his creditors. B also assigned all his interest in the firm assets to C for a similar purpose. D, a firm creditor, issued execution and the Sheriff levied on the property which had belonged to the firm. C brought suit against the Sheriff. Judgment for the plaintiff on the ground that the successive assignments vested the entire property of the firm in C. See *Case* v. *Beauregard, infra,* p. 603.)

Compare: Witter v. *Richards,* 10 Conn. 37, 1833. (A and B were partners, B being a dormant partner. C, a separate creditor of A, attached firm property. D, a firm creditor, though ignorant of the existence of the firm, subsequently attached firm assets, and then brought a bill in equity to enjoin sale under first attachment and to establish his right to priority. The prayer of the bill was granted. Williams, J.: "But it is claimed, that as this partnership was a dormant one, and as the creditors did not know of its existence, they ought to stand upon the same ground as the separate creditors of Hutchinson, whom they all trusted. Now, if the partnership creditors had done any act to hold out Hutchinson as the sole owner of the goods, or if there was any fraud in the case, or even if they could be made responsible for the declarations of Kinne, there certainly would be some foundation for this argument. But no fraud is found; and they cannot be responsible for Kinne's declarations; nor have they done any act intending to give this man a false credit. The partners, therefore, must stand upon their rights, as recognized in a court of equity. And the right of the separate creditor depends upon the interest which each partner had in the partnership property; and such creditor can have nothing but what his debtor had therein."

Linford v. *Linford,* 28 N. J. L. 113, 1859. (A and B were partners. A advanced money to the firm and took B's individual bond. C advanced money to the firm and took the bond of A and B. A and C agreed that if judgments were entered on their bonds the amounts raised thereby should be paid to A and B ratably. Judgments were entered on both bonds, and the partnership property sold on executions issued. *Held,* that A and C should be paid ratably out of the proceeds of the sale; that the law would have given C priority, but he had chosen to barter away his rights, and it was not necessary to decide the question of how far the court would interfere on the application of B to have the partnership property applied first to the payment of partnership debts.

Vandike's Appeal, 57 Pa. 9, 1868. (A and B were partners. Under executions issued by the separate creditors of each, the Sheriff levied and sold property belonging to the partnership. *Held,* that the Sheriff only sold the interest of A and B in the property, not the title of the partnership to the property, and that therefore a firm creditor as such had no interest in the proceeds of the sale.)

TAPPAN *v.* BLAISDELL.

In the Superior Court of Judicature, New Hampshire, 1830.

5 *New Hampshire Reports*, 190.

Case against the defendant, a deputy sheriff, for not levying an execution in favor of the plaintiffs against Hubbard Harris and Jacob Blaisdell, upon certain goods which had been attached upon *mesne process*, as the partnership property of said Harris and Blaisdell.

The cause was tried here upon the general issue, at May term, 1829, when it appeared in evidence that on the 30th of October, 1826, by virtue of a writ in favor of the Grafton bank against Jacob Blaisdell, his interest in the goods belonging to the firm of Harris and Blaisdell was attached; and on the same day, by virtue of a writ in favor of the Pemigewasset bank, against Harris, his interest in the goods belonging to the same firm was attached.

On the 7th November, 1826, the goods attached as aforesaid were again attached by virtue of a writ in favor of the plaintiff, against said firm of Harris and Blaisdell, for a partnership debt.

The plaintiffs in said suits obtained judgments and executions, and all the executions were delivered to the defendant within thirty days after judgment.

On the 16th November, 1826, notice was given to the defendant as follows:

"To A. A. Brewster, Esq., sheriff, and Joshua Blaisdell, deputy:

Gentlemen: You are hereby notified not to sell the property of Hubbard Harris and Jacob Blaisdell, belonging to them jointly as copartners in trade, and attached by you in the action, the Grafton bank against said Blaisdell, and the Pemigewasset bank against said Harris, as those suits

are founded upon the individual debts of said Harris and Blaisdell, and not on their joint debts, as partners in trade; but reserve said property to be sold and appropriated in the suits, Tappan and Mansfield against said Harris and Blaisdell, &c., as those suits are founded on debts due from Harris and Blaisdell, jointly, as partners in trade.

J. QUINCY, Attorney, &c.

But the defendant, after receiving notice as aforesaid, sold the property and applied the whole proceeds to the satisfaction of the said executions in favor of said banks, and returned the execution of the plaintiffs in no part satisfied.

A verdict was taken for the plaintiffs, subject to the opinion of the court upon the forgoing case.[1]

RICHARDSON, C. J.: It seems to have been understood as settled law for a long time, that the share which a partner has in the partnership property may be taken and sold by virtue of an execution issued for his separate debt.

According to the old cases in the courts of law, the separate creditor took the goods of the partners, and sold the share of his debtor, without inquiring what were the rights of the other partners, or what was the real share of each. 1 Shower 169, *Blackhurst* v. *Clinkard;* 1 Salkeld 392; Comyn's Rep. 277.

But the true nature of a partnership seems to have been better understood in more modern times, and it is now settled that each partner has a lien on the partnership property, in respect to the balance due to him and the liabilities he may have incurred on account of the partnership. 4 Johns. C. Rep. 525; Cowper 445, *Fox* v. *Hanbury;* 4 Vesey 396, *Taylor* v. *Fields;* 17 Vesey 193, *Dutton* v. *Morrison;* 16 Johns. 102, *Smith's Case.*

It is also well settled that partnership property cannot be holden to pay the separate debt of an individual partner until all the partnership debts are paid. From the very

[1] The Reporter's notes of the arguments of counsel are omitted.

nature of a partnership it is clear that the whole property is pledged to the payment of the partnership debts, in preference to any other purpose. 4 Vesey, 396, *Taylor* v. *Fields;* 17 Mass. Rep. 206, 207; 6 Pick. 350.

The necessary consequence of all this is, that goods belonging to a firm cannot be holden by attachment upon a writ, or by a seizure upon execution, against an individual partner for his separate debt, so long as any debt remains due from the company. All that can be taken is the interest of the debtor in the firm; not the partnership effects themselves, but the right of the partner to a share of the surplus that may remain after all the debts are paid. 16 Johns. 106; 3 B. & P. 288, *Parker* v. *Pistor; ibid* 289, *Chapman* v. *Koops;* 2 Johns. Ch. Rep. 548, *Moody* v. *Payne;* 4 Vesey, 396; 2 V. & B. 301; 6 Mass. Rep. 271, *Fisk* v. *Herrick.*

It is therefore clear that the plaintiffs in this case were entitled to have the partnership property of Harris and Blaisdell applied to the payment of their execution against the firm, in preference to the executions which has issued against the individual partners, and there must be judgment on the verdict.

PHILLIPS *v.* COOK.

In the Supreme Court of Judicature of New York, 1840.

24 Wendell's Reports, 389.

This was an action of trespass *de bonis asportatis,* tried at the Onondaga circuit in September, 1837, before the Hon. Daniel Moseley, one of the circuit judges.

The plaintiffs made title to the property in question under an assignment *for the benefit of creditors,* executed to them by Mrs. A. Ruoul, a member of the firm of A. Damaus & Co. composed of herself and A. Damaus. The assignment was executed in the evening of the eighth day of December, 1836. The business of the firm was that of druggists and booksellers, and by the assignment executed by Mrs. Ruoul, *in the name of the firm,* all the goods, books, stationery, drugs, medicines, and all other property in the store occupied by the firm in the village of Syracuse, was transferred to the plaintiffs. The firm at the time was *insolvent.* The property assigned amounted to nearly $5000. On the 9th December the plaintiffs took possession of the property and commenced the disposition thereof at private sale and at auction, and continued to do so until 30th January, 1837, when the defendant, as a deputy of the sheriff of the county of Onondaga, took and sold goods of the value of $536.56, and delivered the same to the purchasers. The defendant sold the goods by virtue of an execution against A. Damaus, one of the members of the firm of A. Damaus & Co. who absconded about the first day of November, 1836. The defendant, as deputy sheriff, received the execution on the seventh day of December, 1836, and on the next day *in the morning* levied upon the goods in the store then occupied by the firm of A. Damaus & Co. All, however, that he did as to the levy was to go into the

store and see the goods. The execution was for $410. The counsel for the defendant insisted that the assignment was void as against a creditor who had caused a *levy* to be made upon the individual interest of one of the partners by virtue of an execution, and at all events that *trespass* would not lie. The judge charged the jury that the assignment was valid, and that the defendant was not in a situation to question it; that *trespass* was the proper action, and that the plaintiffs were entitled to recover. The defendant excepted to the charge, and the jury found a verdict for the plaintiffs for $536.56. The defendant asks for a new trial.[1]

By the Court, COWEN, J.: A point is now made on the validity of the levy; but it was not raised at the trial; and the only question is whether *trespass* will lie against the sheriff for seizing and selling under a *fi. fa.* the property of an insolvent firm, to satisfy the individual debt of one of the members. The action here is the same as if it had been brought by the partners, it being by trustees, claiming under an assignment made subsequent to the levy. The question has been a good deal discussed before us in consequence of some apparent conflict in the cases, and a difficulty upon them, felt more by the other members of the court than by myself. For one I never could bring myself to doubt *a priori;* nor have I been able to see any serious discrepancy in the adjudications. Not a single direct authority has been shown for maintaining this action; nor any intimation to that effect, although the question stood over in *Thurber* v. *Lewis,* for several terms, under directions to re-argue. The whole doctrine is gone into a distinct section of *Collyer on Partnership,* 473, to 478, *Am. ed. of* 1839, where several of the most material cases, English and American, are cited. The result is, that at law, the sheriff may *seize* and *sell* the interest of a partner in all choses in possession, the same as

[1] The Reporter's notes of the arguments of counsel are omitted, and, because of its great length, only a portion of the opinion is reprinted.

he may that of any joint tenant, or tenant in common. Partners are joint tenants in the stock and all the effects; they are seized *per mi et per tout.* Collyer, 64. And the rule of proceeding expressly laid down in the books is, that, under a *fi. fa.* against one, the sheriff must seize the entire partnership effects, so far as may be necessary to satisfy the execution; he must sell that partner's share against whom the execution is; and then the vendee becomes tenant in common with the other partner. *Backhurst* v. *Clinkard,* 1 Shower, 169. Holt, 643, S. C. *Heyden* v. *Haydon,* 1 Salk. 392. The doctrine of these cases has never been doubted; but has been as often reaffirmed as the question has been mentioned by courts or in any of the *Treatics on Partnership.* It was adjudged in *Jacky* v. *Butler,* 2 Ld. Raym. 871, and in *Marriott* v. *Shaw,* Com. Rep. 275, 277. The true rule was laid down by Holt, Ch. J., in *Pope* v. *Haman,* Comb. 217: "Upon a judgment against one partner, the sheriff may take the goods of both in execution; and the other co-partner hath no remedy at law, otherwise than by retaking the goods, if he can; for the vendee of the sheriff becomes tenant in common with the other co-partner." This is but saying what every one would, who has studied the text of Littleton, *Co. Litt.* Sec. 323, 199, *b.* So far as this section and Coke's Commentary pertain to the question, they are both adopted in *St. John* v. *Standring,* 2 Johns. R. 468.

It does not appear to have been doubted in any age of the law, that the sheriff might take and sell the separate partner's interest. The questions have been whether he might not sell the whole interest of both, on a *fi. fa.* against one; or whether he could seize the whole. The answers in all the cases have been, you must seize the whole, and sell only the moiety belonging to the debtor. These were called old cases on the argument; the antiquity of those cases only adds to their strength. They are all, however, since the revolution of 1688, ranging from Wm. and Mary down to the Georges. They were cited and approved by

Lord Kenyon, in *Smith* v. *Stokes,* 1 East, 363, 367. More than that, they were expressly affirmed by a decision of this court, *Schrugham* v. *Carter,* 12 Wendell, 131. The entire partnership property was there taken under an execution against one, and this court held that *replevin* would not lie by the assignees of the firm. Savage, Ch. J., laid down the law as it was understood by Holt, Ch. J., in the reign of William and Mary.

It was admitted in argument that the sheriff may seize, but it was said that neither he nor the purchaser can remove the property. Whereas the cases at law are all express that he may sell, from *Holt* down to the 12 *Wendell.* The distinction sounds singular on its face. For what purpose does a sheriff seize property on a *fi. fa.* if not to remove and sell it? But his power was assailed *a priori,* and it was said he can exercise no greater power over the property than the copartner against whom the execution goes; that by the levy, the sheriff is but a tenant in common, who must wait his chance, and take the goods when he can; but he cannot remove them if his co-tenant be unwilling and hold on to the possession, without committing a breach of the peace. If this were so, the reason would be a perfect *non sequitur* as to the right of suing in trespass *de bonis,* trover or replevin, however it might entitle the co-tenant to sue for an assault in wresting the property from him. *Hyatt* v. *Wood,* 4 Johns. R. 150, 159, 160. But is the law so absurd as to command a sheriff by its writ to seize and sell an article, yet forbid him to remove it, or declare him a breaker of the peace for selling it, because he resisted, and put to the exercise of force? This is a sort of imbecility which the common law has been careful to avoid in all cases. When it directly commands an officer to do any act, it impliedly gives him the power and means of performing it, and in nothing is this rule more conspicuous than in the execution of a sheriff's power. But it cannot be necessary to pursue the question through a course of reasoning, for the sheriff's right at law is settled by the authority of this

court. *Wilson & Gibbs* v. *Conine*, 2 Johns. R. 280, is not opposed to it. There both the partners sued in *trover* for a seizure upon execution against one; but they recovered merely because the defendant failed in his formal proof of the decree on which the execution issued. On motion for a new trial, the preference of partnership creditors was recognized, on the ground, as expressly stated, that the motion appealed to the equity of the court. They did not pretend to deny the sheriff's legal right, though he had seized and sold a consumable article, after being forbidden by the plaintiff, and the purchaser had actually taken it away. No one even hinted that the sheriff wanted the legal power, provided his authority had been shown. *Vide* per Kent, Ch. J. at p. 282. There are, I concede, some respectable *dicta* which favor an action at law by the partner who has been thus dispossessed: the action being in his name alone. Such is that of Putnam, J., in *Rice* v. *Austin*, 17 Mass. R. 206, 7, and Parker, J. in *Gibson* v. *Stevens*, 7 N. H. Rep. 357, 8. Putnam, J., cited no authority, and professedly spoke hypothetically. The point was not raised and finally decided in either of the cases; and Parker, J., admitted himself to be speaking on a difficult branch of the law. I have looked into the three cases cited by him. Two of them avowedly go on the ground of equity—impliedly therefore admitted the law to be different from what the learned judge understood it to be. The third was a case of tenants in common, the sheriff having expressly sold the whole under an execution against one. *Melville* v. *Brown*, 15 Mass. Rep. 82. *Vide White* v. *Osborn*, 21 Wendell, 72 S. P. as to a sale of the whole by one of two tenants in common. It would be different, even in such a case, should the sheriff sell only the proper share, though he seized the whole, as he must. Clearly it cannot be denied that a copartner has as great an interest at law, and even a greater than a simple tenant in common, nor that if the sheriff can on a *fi. fa.* against one of several tenants in common, take the whole chattel and sell the moiety in de-

spite of opposition from the co-tenant, he may do so as against the co-partner. That he may do it in the former case was directly held in *Messereau* v. *Norton,* 15 Johns. R. 179. He had, under an attachment against one tenant in common, seized and taken a yoke of oxen from the actual possession of the other, and proceeded to sell them; and they were taken away by the purchaser, though the co-tenant forbade the sale. He brought trespass; but this court held it would not lie, citing as authority the very case of *Heydon* v. *Heydon,* respecting the sheriff's authority against one of several partners. In *Shaver* v. *White,* 6 Munf. 110, the attachment was sued out against one of two partners, and 300 head of cattle taken by the sheriff out of the possession of both; and they both brought trespass for the taking. The action was against the plaintiff in the attachment who directed the sheriff to levy. The court held that the action would not lie, and pronounced their opinion, also, that it could not be maintained against the sheriff, citing *Heydon* v. *Heydon.* The argument for such an action goes the length of saying that when a man puts his property into partnership, it is absolutely protected against a levy at the suit of his individual creditors; that it is exempt from execution like his ten sheep or his cow under the statute. A debtor has but to form a partnership, and he may set executions at defiance so far as his own debts are concerned, still possessing and trading upon that very capital contributed by his individual creditors. It was thought singular by a learned judge in Pennsylvania, that even the qualified exemption allowed in such a case by a court of chancery should not have been repudiated as contrary to the statute against transfers to defraud creditors. He said, "that a contract which enables the parties to keep a class of their creditors at bay, and yet retain the *indicia* of ownership, should not have been deemed within the statute of Elizabeth, is attributable exclusively to the disposition universally manifested by the courts of justice to encourage trade." Gibson, Ch. J. in *Doner* v.

Stauffer, 2 Penn. R. 204. To give an action of trespass by the partners, would make the contract equivalent to the protection afforded by the owner's dwelling house. It would be putting it under perpetual lock and key as to all his private debts.

It is supposed that *Dob* v. *Halsey*, 16 Johns. R. 34, gives countenance to this action. That was assumpsit by two out of three partners, to recover the price of goods sold by a third, because he had turned them out in payment of his private debt. The plaintiffs were non-suited, on the ground that *all* the partners had not joined. The action was a singular one. The decision seems to suppose that after a partner has sold the goods of the firm in payment of his honest debt, without any fraud as against himself, he may join his co-partners in an action to recover the price of the goods—a price which, when recovered, he may release, or still use the avails for his individual benefit. Admitting his co-partners to have been defrauded by the sale, a bill in equity against him and the vendee, would seem to be the more obvious remedy. In *Rodcriques* v. *Heffernan*, 5 Johns. Ch. R. 417, a bill was filed and relief obtained in that form, for such an injury. The state of accounts between the partners should be inquired into, and if the firm be not injured, the vendee should not be disturbed. He has obtained no more than the law would give him, on execution against the man from whom he received the goods. Independently of an account, and especially where the action at law is in the name of all the partners, I cannot but think the decision of the supreme court of appeals of Kentucky in *Owings & Co.* v. *Trotter*, 1 Bibb, 157, denying an action to the firm, more in accordance with the law and justice of the case.

In the State of Vermont, all preference of partners or their creditors by way of lien over an attachment or execution for the debt of a sole partner has been entirely repudiated, both at law and in equity. *Reed* v. *Shepardson*, 2 Verm. R. 120.

On the other hand, there is no doubt of the *equitable rule* in England, New York and most of the states, that, though the sheriff may at law levy on and sell the right of the individual partner, which shall pass absolutely to the purchaser, yet he takes subject to an account between the partners, which if it eventuate against him, his purchase may go for nothing. That, however, is his own look out. It is no reason why the creditor should be deprived of his legal right to sell, or the purchaser of his right to buy. * * *

I admit that courts of law have sometimes felt able to apply this equitable doctrine. One instance is, where an action for a false return was brought against the sheriff, on the ground that he had omitted to levy on partnership property under process of domestic attachment or *fi. fa.* against an individual partner. *Dunham* v. *Murdock,* 2 Wendell 553. *Pierce* v. *Jackson,* 6 Mass. R. 242. *Phillips* v. *Bridge,* 11 Mass. R. 242, 249. *Commercial Bank* v. *Wilkins,* 9 Greenl. 28. *Tappan* v. *Blairsdell,* 5 N. Hamp. R. 189. This is on the obvious ground that the plaintiff has lost nothing but that of which a court of chancery would have deprived him; and the sheriff ought not to be held accountable for doing what the court of law sees that a court of equity would have compelled him to do. So the equitable right was tried at law where a partner sold out his share, covenanting against liens; the balance on an account, *inter se,* was decidedly against him, for which it was held his co-partner had a lien, and so the covenant violated. *Hodges* v. *Holeman,* 1 Dana, 50, 53. Other like instances exist, some of which I shall hereafter have occasion to notice.

It is said this court is in the habit of arresting the sheriff's proceedings, on the application of the debtor's partner, that it will order an account to be taken by the clerk, and then direct the sheriff to pay such share of the proceeds to the co-partner or shall appear to be his due. Something like this was indeed done in *Eddie* v. *Davidson,*

Doughl. 650. The case, however, recognized the sheriff's right to sell, and the order was in terms to pay a part of the *money levied*, to the assignees of the co-partner. The assignees obtained the order. A like order was made A. D. 1816, in *The King* v. *Rock*, 2 Price, 198, on motion by partners; and the court said there had been many instances of such a reference, but they denied an *amovcas manus*, thus recognizing the right to sell. *Vide* note, *id.* 198. Lord Eldon said, A. D. 1813, in *Waters* v. *Taylor*, 2 Vesey & Beames, 301, "According to the old law, I mean before Lord Mansfield's time, the sheriff, under an execution against partnership effects, took the *undivided share* of the debtor without reference to partnership accounts: but a court of equity would have set that right by taking an account, and ascertaining what the sheriff ought to have sold. The courts of law, however, have now repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a court of equity ascertained previously what was to be sold. How could a court of law ascertain what was the interest to be sold, and what the equities; depending on an account of all the partners for years?" The action of the courts of law, however, seems not to have been by any means so uniform as Lord Eldon supposed. The rule alluded to by him had been applied for to the chief baron in *Chapman* v. *Brooks*, 3 Bos. & Pull. 289, but the application was unanimously refused; the court all saying the question belonged to a court of equity; that they had no power to take an account: and that the sheriff had a perfect right to go on and sell. Lord Alvanley said he hoped that would be the last application of a similar kind. [See two like cases before that in the same book, pp. 254 and 288.] Chambre, J. mentioned that in *Eddie* v. *Davidson*, no objection was made to the sale; but there was merely an application for a share of the proceeds after sale; and no objection to the motion by the party levying. In *Parker* v. *Pistor*, 3 Bos. & Pul. 288, 289, the court said

all the difficulties were to be encountered in equity, the case being plain at law. "That the safest line of conduct for the sheriff to pursue, was to put some person in possession of the defendant's share *as vendee*, leaving him and the parties interested, to contest the matter in equity, where a bill might be filed stating that he had taken possession of the property, and praying that it might not be disposed of until all the claims were arranged." This appears to be the approved practice in Connecticut. *Witter* v. *Richards,* 10 Conn. R. 37, 43, per Williams, J., who cites and approves the direction in *Parker* v. *Pistor.* * * *

It seems to me the English common pleas were right when they said the conflict between suitors for joint and separate debts can be settled by chancery alone. Creditors and partners not before the court must be made parties, complicated accounts for years must be settled, a large concern to be wound up perhaps. This court has neither the abstract power, the process, the officers, nor any of the proper machinery for prosecuting such a business. How is this court to decide on motion, even whether there be a partnership or not? Be this as it may, however, and whether we ought ever to interfere summarily or not, the argument can have no bearing in favor of this novel remedy by *trespass* or *trover.*

My opinion is that a new trial should be granted; the costs to abide the event.[2]

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[2] *Compare: Fenton* v. *Folger,* 21 Wend. 676, 1840. (A and B were partners. C, a separate creditor of A, issued execution on partnership property. D, a firm creditor, then issued execution on the same property. There was not time for the Sheriff to advertise the sale under D's execution before he sold the property under C's execution. *Held* by the court, Nelson, C. J., that D had no interest in the proceeds; but that had the Sheriff sold the property upon both executions at the same time, D, as a firm creditor, would have had a preference on the proceeds.)

Cooper's Appeal, 26 Pa. 262, 1856. (A and B were partners, A having invested $19,082.61 and B $1,714.26. C, a separate creditor of A; D, a separate creditor of B, and E, a creditor of the firm, all issued executions and levied on firm property in the order named. The property was sold by the Sheriff jointly under all executions. The court on appeal directed that the joint creditor be paid first, and that the balance be divided between C and D according to the interest of A and B in the firm property; and that as B in a settlement of partnership accounts

would not have been entitled to anything, his execution creditor had no interest in the proceeds of the sale, and the entire balance should be awarded to C.)

Sterrett v. *Third National Bank of Buffalo,* 46 Hun. 22, 1887. (A and B were partners. In the course of the business they gave firm notes to C and as collateral certain pipe line certificates belonging to the firm. A was indebted to C. C brought an action against A, recovered judg ment and caused a levy to be made on the certificates. A and B paid the notes and demanded the certificates, which demand was refused. A and B sued C for a conversion of the certificates. The only question of fact tried in the case was whether the firm of A and B was insolvent when C caused the certificates to be attached. The firm having been determined to be insolvent, the court held that therefore, A as an individual had no interest in the firm property which was subject to attachment. Judgment for plaintiffs.)

WASHBURN *v.* BANK OF BELLOWS FALLS.

In the Supreme Court of Vermont, 1847.

19 *Vermont Reports*, 278.[1]

Redfield, J.: This is a bill, brought by the creditors of a partnership, on the part of themselves and so many as may join in the suit claiming a preference over the separate creditors of the partners, and that the latter may be restrained from levying upon the partnership effects, until the claims of the plaintiffs are satisfied. The Bellows Falls Bank is the first in the order of the attachments, and that and the other creditors of the separate partners are sufficient to absorb all the funds of the partnership, which have been reduced to cash by the receiver. The other separate creditors have attached subsequqently to the bank; and the plaintiffs, who are partnership creditors, have also attached, subsequent to the bank and some other of the separate creditors. All these claims have gone into judgments, and the sum of the plaintiffs' claims, united, is also sufficient to absorb the partnership funds. So that the controversy in the present case is to the full extent of all the property attached.

No question can be reasonably made, I think, in regard to the failure and *utter insolvency of the partnership*, at the time of the first attachment by the bank, although there is some testimony in the case, going upon the basis of a very imperfect and unequal estimate of assets and liabilities, which would lead to the contrary result. The only real difficulty in this case is, to determine whether the partnership creditors are entitled to a preference over the separate creditors of the partners, in the distribution of the partnership funds. And this, I apprehend, could not now be

[1] The Reporter's statement of the facts of the case and his notes of the arguments of counsel are omitted. A part only of the opinion of the court is reprinted.

esteemed a question of any difficulty, upon the principles of the English common law. * * *

We think, therefore, that, in this case, the partnership creditors are entitled to a preference over the separate creditors, who first attached. The decree of the chancellor is therefore reversed, and the cause remanded to him, with directions to enter up a decree for the orators to be paid their debts out of the partnership funds, to the full extent, if the money in the hands of the receiver is sufficient for that purpose, and the residue, if any, to be paid to the creditors of the separate partners, until expended, in the order of their attachments; and if the funds in the hands of the receiver are not sufficient to pay all the orators' claims, then to be paid to them, in proportion to the amount of their demands, as far as it will go.[2]

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[2] *Compare: Cammack v. Johnson,* 2 N. J. Eq. 163, 1839. (Chancellor Pennington: "A question has indeed been made, whether an injunction ought to issue to stay an execution at law against one of the partners from selling the partnership property, for the reason, that such sale could only reach the interest of such partner, which must of course be in the residue, after discharging all the partnership debts: in other words, because the sale could only place the purchaser, as to the property, in the same situation that the defendant in the execution was prior to such sale. Chancellor Kent, in the case of *Moody* v. *A and H. Payne,* 2 Johns. Ch. Rep. 548, refused to interfere in such case; but in 1 Story's Equity, 628, it will be seen, that learned author reviews this decision, and takes the opposite side of the question, insisting that it is a proper case for injunction. His reasoning is very strong, especially as applcable to personal property. He says, 'It may be extremely difficult to follow the property into the hands of various vendees; and their lien may perhaps be displaced, or other equities arise by intermediate *bona fide* sales of the property by the vendees, or purchasers without notice; and the partners may have to sustain all the chances of any supervening insolvencies of the immediate vendees.' For these reasons, to prevent multiplicity of suits and irreparable mischiefs, he is in favor of restraining the sale altogether. When such men differ, it is indeed difficult to decide; though I confess the reasoning of Justice Story, as applied to the case of chattels, appears to me extremely forcible and just."

Greenwood v. *Brodhead,* 8 Barb. 593, 1850. (A *et al.,* alleging that they were partnership creditors of B and C, brought a bill in equity to compel the application of the proceeds of the partnership property to the payment of partnership debts. The defendants were the partners, the assignee of an individual partner, and his vendee. Demurrer sustained. Parker, J.: "I think the true rule is this. To authorize any person to demand the aid of this court in directing the application of partnership property, he must have a lien, either legal or equitable upon it, or must be in a situation to assert such a lien. One of the partners may file a bill in the first instance, against his copartners to compel an account and

the marshalling of assets. He does so by virtue of his *lien* upon the whole funds of the partnership, for the balance finally due him, after payment of the partnership debts. (Story's Eq. Jur., Sec. 675.) So the creditor must proceed to obtain a *lien* on the property before he can interfere to control it. If it be real estate, he obtains the lien by judgment; if personal property liable to execution, by levy under such process; and if *choses in action,* by the return of an execution unsatisfied and filing a complaint. (*Corning* v. *White,* 2 Paige, 567; *Edmeston* v. *Lyde,* 1 *Id.* 637; *Wakeman* v. *Grover,* 4 *Id.* 23.) Until such lien is obtained the partners have full power to make any *bona fide* sale of the property they think proper. But when such lien exists the creditor may claim the aid of this court, to restrain the disposition of the property, by injunction, to have it placed in charge of a receiver, and to compel its equitable application. This law has not been changed by the code.") *Accord: Crippen* v. *Hudson,* 13 N. Y. 161, 1855.

Hubbard v. *Curtis,* 8 Iowa, 1, 1859. (A and B were partners. C, a separate creditor of B, levied on partnership goods. A, alleging that the assets of the firm were insufficient to meet its obligations, brought a bill to restrain the Sheriff from interfering with the property of the firm, to dissolve the firm, and appoint a receiver to take charge of all the assets. The Sheriff was allowed to sell the property attached, subject to the liability to pay the partnership debts. Subsequently, on final hearing, it was decreed that the firm be dissolved, 'a receiver appointed;' that the Sheriff deliver to the receiver any goods of the firm not sold by him, and that the purchaser of goods of the firm sold by the Sheriff under the interlocutory order deliver said goods to the receiver, and be enjoined from further intering in relation to the same.)

Harney v. *First National Bank,* 52 N. J. Eq. 697, 1894. (A and B were partners. Land was conveyed to them as tenants in common, but was treated by them as part of the assets of the firm. C, a separate creditor of B, secured a judgment against B and levied on the land. The executors of A brought a bill in equity against B and C and secured a decree subjecting the land to the payment of partnership debts before the satisfaction of C's judgment, the court holding that the equity of the partner to have the partnership assets applied to the payment of partnership debts was superior to the right of the judgment creditors of his copartner, and that an express trust for the firm was not necessary where the legal title was in the partners as tenants in common. On this last point see *Foster* v. *Barnes,* 81 Pa. 377, 1876, *contra.*)

NIXON *v.* NASH.

In the Supreme Court of Ohio, 1861.

12 Ohio State Reports, 647.[1]

Peck, J.: The petition was filed in this cause, by a judgment creditor of one member of a mercantile firm, to enforce a lien created by the levy of an execution upon his debtor's interest in the firm, prior to any sale upon execution of the interest so levied on.

The demurrer to the petition raises several questions, the most important of which are:

1. Whether the separate creditor, by such levy, acquires, at law, *any lien* upon his debtor's interest in the joint assets, and if so, its *nature and extent?*

2. Whether such separate creditor, after the levy and *before the sale,* can invoke the equity powers of the court, to ascertain the extent of the debtor partner's interest in the goods thus seized?

Each partner has a legal interest and right of possession, as to all the joint assets, and it would be strange, indeed, and contrary to public policy, if such an interest could not be seized and subjected to the payment of any judgment against him. To hold otherwise, would place it in the power of an unscrupulous debtor, by entering into such relations, to screen his property, or to so hedge the approaches to it, as to render it almost, if not altogether, inaccessible to his creditor. This, justice and sound policy will not permit, and, accordingly, we find it universally admitted, that the interest of a partner in the tangible property of a firm, is liable to seizure, upon execution, in favor of his separate creditor. *Mayhew* v. *Herrick,* 62 Eng. C. L. (7 M. & G.) 240; *White* v. *Woodward & Rand,* 8 B. Mon.

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[1] The Reporter's statement of the facts of the case is omitted.

485; *Phillips* v. *Cook*, 24 Wend. 389; *Scrughan* v. *Carter*, 12 Wend. 131; *Wash* v. *Adams*, 3 Denio, 125; *Church* v. *Knox*, 2 Conn. 514; *Newhall* v. *Buckingham*, 14 Ill. 405; *Whitney* v. *Ladd*, 10 Verm. 165; *Knox et al.* v. *Sumner*, 4 Yeates, 477; *Moore & Co.* v. *Sample*, 3 Ala. 319; *Burgess* v. *Atkins*, 5 Blackf. 377; *Deal* v. *Bogue*, 20 Penn. St. 228; *Place* v. *Sweetzer et al.* 16 Ohio Rep. 142; Collyer on Part. sec. 822, *et seq.*; Story on Part. sec. 261, *et seq.*; 1 Parson's on Cont. 176, *et seq.*

But while the right to levy is thus conceded, the authorities differ widely, as to the course to be pursued by the creditor and the officer executing the writ.

In some cases, the right of the officer to take the goods, even temporarily, out of the immediate possession and control of the other partners, is denied, and in others, a temporary interruption of their possession, in order to take an inventory, is reluctantly permitted; still the decided weight of authority seems to be, that the officer may, and, for his own security and that of the execution creditor, should take possession of all the chattels levied on, and after the sale of the debtor's interest therein, re-deliver the same to the other partners *and* the purchaser, who are said to be *tenants in common* of the chattels so sold.

The levy and sale must be of an undivided interest in the chattel, corresponding to the debtors *share* or *nominal interest* in the firm; but it is also well settled, that the separate creditor or the purchaser at such sale, acquires only the *beneficial interest* of the debtor partner in the articles sold. Each partner holds his interest in the joint property, subject to a trust for the partnership creditors, and the claims of his several co-partners; so that the beneficial interest of each, is his residuary share after the partnership accounts are settled and their rights, *inter sese*, adjusted.

The seizure and sale is, *pro tanto*, at least, a dissolution of the partnership, and calls for an adjustment of the joint business. If the partnership is then entirely solvent, the beneficial interest of the debtor in the articles sold, may equal his proportionate share in the joint business; but if

not so, a part, if not the whole, of his interest therein, may be required to liquidate the balance due from him on the final adjustment.

Inasmuch as the levy and sale must be of an undivided part of the chattel, equal to the debtor's original interest in the joint business, while the purchaser acquires only the *present* beneficial interest of the debtor, it is manifest, that the uncertainty as to the extent of that interest, must seriously embarrass the sale. It would, doubtless, be much better for all parties, if the beneficial interest of the debtor could be ascertained before the property is offered for sale, especially if there is any reason to apprehend, that the *beneficial* interest of the debtor is much disproportioned to his *apparent* interest.

Courts of law are not provided with suitable means for adjusting the complicated accounts of a partnership (Story on Part., sec. 262), though it seems that the court of king's bench has, in some instances, directed the taking of such account previous to a sale. Collyer on Part., sec. 827.

The separate creditor acquired, by his levy, a lien upon the legal interest in possession of his debtor, but owing to the conflicting rights and interests of the other partners, that lien can not be precisely ascertained nor adequately enforced at law. On general principles, then as well as in analogy to the relief granted in equity, in cases of conflicting liens upon real estate, requiring the adjustment of complicated accounts and a marshaling of assets, it would seem that either party, the creditor or the other partner, should have the right, of petition, to require a settlement of the partnership account, and an ascertainment of the beneficial interest of the debtor partner, before that interest is subjected to a sale.

Judge Story, in section 263 of his treatise on partnerships, while treating of the levy of an execution by the creditor of one partner, upon that partner's interest in the joint property, says: "the judgment creditor himself may file a bill against the other partners, for the ascertainment of

the quantity of that interest, *before any sale is actually made under the execution.*"

It was held, indeed, in *Moody* v. *Paine,* 2 Johns. Ch. 548, that one *copartner* could not file a bill against the separate creditor of his copartner, who had levied an execution upon that partner's interest in the joint property, for an account of the partnership, and to enjoin a sale until the taking of such account. Judge Story, in commenting upon this decision, in section 264 of his said treatise, arrives at the conclusion, and we think correctly, that the decision in *Moody* v. *Paine* is unsound in principle, and not sustained by the authorities.

In *Place* v. *Sweetzer et al.,* 16 Ohio Rep. 142, it was also held that a bill might, in such case, be filed by a partner against the separate creditor of a copartner, to restrain a sale upon execution, until an account could be taken of the partnership and the beneficial interest of the debtor partner ascertained.

In *Sutcliffe* v. *Dohrman,* 18 Ohio Rep. 181, the court reviews and fully approves of the decision in *Place* v. *Sweetzer,* as correct in principle; and upon page 186 says, that the *creditor* also had an *equal right* to appeal to a court of chancery by bill, to have his rights determined in relation to the property, instead of resorting to a sale under the execution.

It is clear, we think, upon principle and upon authority, that the levying creditor, in the case at bar, having acquired a lien by the seizure, in execution, of his debtor's interest in the tangible property of the firm, might properly file his petition against the other partner for an account of the partnership and the ascertainment of his debtor's interest in the property seized, before a sale upon execution.

The rule, in Ohio at least, seems therefore to be, that upon such levy being made, it is the right of the creditor and of the other copartners, should either desire, to invoke the the equity powers of the court to adjust the partnership business and to stay proceedings under the execution, till the

beneficial interest of the debtor partner in the goods seized has been ascertained. But that if the creditor does not so elect, and no such steps are taken by the other partners, the officer executing the writ must sell the apparent interest of the debtor in the chattels levied on, and upon such sale, re-deliver the same to the other partners and the purchaser who will then be owners in common, subject to a lien in favor of the other partners and the joint creditors, upon the interest of the debtor partner in the hands of the purchaser, for any balance due upon final adjustment of the partnership account.

It does not appear, from the averments of the petition, that the officer executing the process took the goods seized into his exclusive possession, and it is perhaps inferable from the petition, that he suffered the same to remain in the custody of the other partners without receipt or security. His doing so, however, was not an abandonment of the levy (Gwynne on Sheriffs, 212); and as the petition avers that the other defendant, Atkison, who still holds the goods and by the purchase from Nash, claims the entire property therein, was aware of the levy at the time it was made, the defense of a *bona fide* purchaser could not be interposed.

The judgments of the district court and court of common pleas reversed, the demurrer to the petition overruled, and the cause remanded to the common pleas for further proceedings.

Sutliff, C. J., and Gholson, Brinkerhoff and Scott, JJ., concurred.[2]

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[2] *Compare: Clagett* v. *Kilbourne*, 1 Black. 346. ("The purchaser [at Sheriff's sale on attachment and sale of partner's interest in firm's goods at the suit of a separate creditor] takes the same interest in the property which the judgment debtor would have upon a final adjustment of all the accounts of the partnership. It is not only an undivided, but an unascertained, interest, and the purchaser is substituted to the rights and interests of the judgment debtor in the property sold. Neither does the sale transfer any part of the joint property to the purchaser, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner (judgment debtor) himself. The remedy of the purchaser is to go into equity and call for an account, and thus entitle himself to the interest of the judgment debtor, if any, after the settlement of the partnership liabilities.")

MENAGH *v.* WHITWELL.

IN THE COURT OF APPEALS, NEW YORK, 1873.

52 New York Reports, 146.

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of the plaintiff entered upon the report of a referee. This action was for taking and converting personal property.

The property consisted of machinery, utensils, lumber and other chattels formerly belonging to the firm of J. C. Smith & Co., and appertaining to a yeast factory operated by that firm.

From the 17th of August to the 22nd day of December, 1866, the firm consisted of John C. Smith, Hollister E. Goodwin, John Wride, Marietta Huntington and William B. Rubert, each being interested to the extent of one-fifth.

The firm as thus constituted contracted debts to the Geneva National Bank, upon which judgments were afterward recovered against the above named parties, viz., one judgment for $1,403.83, and one for $237.53, both recovered May 24, 1867. The larger judgment embraced claims to the amount of $330, which accrued after the withdrawal of John Wride from the firm.

Executions were issued on these judgments on the 25th of May, 1867, and placed in the hands of the defendant, Ringer, who was deputy sheriff of Ontario county, and by virtue of those executions he levied upon the property on the 19th of July, 1867, and sold it on the 29th of July, 1867. The defendant, Whitwell, was sheriff, and this action was brought against him and his deputy for that levy and sale. The plaintiff recovered four-fifths of the value of the property.

The plaintiff makes title to this four-fifths as follows:

On the 22d of December, 1866, John Wride assigned all his interest in the property and business of the firm to John C. Smith, who agreed to pay the firm debts, and on the 4th of February, 1867, Marietta Huntington assigned all her interest in the property of the firm to said John C. Smith, who assumed her place in the firm. After these transfers the same business was carried on by the remaining partners under the same firm name. The referee finds that both of these transfers were made with the consent of all the other members of the firm and in good faith, without intent to defraud the creditors of the firm.

On the 28th of February, 1867, the firm, then consisting of John C. Smith, William B. Rubert and Hollister E. Goodwin, and Smith's interest being then the three-fifths, he gave to the plaintiff a chattel mortgage upon his undivided three-fifths interest in the yeast factory, property, accounts and other choses in action of the firm, to secure his individual debt to the plaintiff of $2,400, payable in installments in two, five and seven months, with power to take possession and sell in case of default, or whenever she should deem herself unsafe, before default. The referee finds that this amount was justly due to the plaintiff for money loaned by her to Smith, which he had used for the firm and for which it was indebted to him; and that the mortgage was given in good faith, with the consent of all the persons composing the firm, and without intent to defraud creditors. There is no express finding in respect to the solvency of the firm at the time of the giving of this mortgage.

On the 2d of February, 1867, William B. Rubert had given a like chattel mortgage on his one-fifth interest to Samuel E. Rubert, to secure an individual debt of $500, payable in five days. The referee finds that this was a just debt for money loaned, and that the mortgage was executed in good faith to secure the debt, and without any fraud-

ulent intent. It does not appear that any of the other partners consented to this mortgage.

On the 10th of May, 1867, the plaintiff and Samuel E. Rubert took possession of the property mentioned in their respective mortgages, and, after advertisement, it was sold on the 18th of May, 1867, the three-fifths interest of John C. Smith being purchased by the plaintiff for $1,000 and the one-fifth interest of William B. Rubert being bought in by Samuel E. Rubert for an amount less than his mortgage.

On the same day John C. Smith sold and delivered to the plaintiff all his interest in a quantity of lumber, boxes and other material then on the premises, and belonging to the firm, for $200, which was applied in part payment of the plaintiff's mortgage. The referee finds that this sale was in good faith and without any fraudulent intent. This lumber, etc., was levied upon and sold by the defendants and is embraced in the plaintiff's recovery.

On the same day on which the plaintiff and Samuel E. Rubert took possession under their mortgages, viz., the 10th of May, 1867, Hollister E. Goodwin, the only remaining member of the firm, transferred his undivided one-fifth interest in the property and business of the firm to Mary B. Goodwin, who still owns the same, but never became a member of the firm. The referee has not found that there was any consideration for this transfer, or what was its object, or that it was made in good faith.

The only findings in respect to the solvency of the firm at the times of these several transactions are that, on the 22d of December, 1866, when John Wride withdrew from the firm, transferring his interest to John C. Smith, the firm was somewhat embarrassed, but was not known or believed to be insolvent by either Wride or Smith; and that, on the 4th of February, 1867, when Marietta Huntington transferred her interest, the financial affairs of the firm were about the same as they were on the 22d of December, 1866. That the firm was largely indebted and somewhat

embarrassed. That the value of its property and assets depended in part upon the continuance of its business, and, in case such business were continued and properly managed, the property and assets of the firm were more than sufficient to pay its debts.

The referee further finds that, at the time of the seizure and levy by the defendants, the property was in the possession of the plaintiff and Samuel E. Rubert, and was of the value of $2,150. That the plaintiff was the owner of an undivided three-fifths and Samuel E. Rubert of one undivided fifth part thereof, and that Mary B. Goodwin was the owner of the other undivided fifth part thereof; and that, on the 15th of August, 1867, and before the commencement of this action, the said Samuel duly assigned to the plaintiff all his rights to the property and cause of action against the defendants for the taking possession thereof.

As conclusions of law, he finds that, at the time of the levy, neither of the defendants in the executions had any leviable interest in the property, but that it belonged, four-fifths to the plaintiff, and one-fifth to Mary B. Goodwin. That the bank had no lien thereon, and that the plaintiff was entitled to recover four-fifths of the value, amounting to $1,720, with interest from the time of the conversion.[1]

Rapallo, J.: The mortgages executed by John C. Smith and William B. Rubert appear to have been regarded by the learned referee as transferring an undivided four-fifths of the *corpus* of the partnership property therein described. He has found, as to the mortgage from Smith, that it was executed and delivered with the assent of the other members of the firm. This mortgage, if such be its true construction, having been given to secure the individual debt of the partner, even if effectual as to the firm, by reason of the concurrence of all the partners giving it, would be a fraudulent misapplication of the partnership

[1] The Reporter's notes of the arguments of counsel are omitted.

property, and void, as to the creditors of the firm, under the principle of the cases of *Ransom* v. *Van Deventer* (41 Barb., 307), and *Wilson* v. *Robertson* (21 N. Y., 587), unless the firm were solvent at the time the mortgage was given, and sufficient property would remain, over and above that devoted by that instrument to the payment of the individual debt, to pay the debts of the firm. The Supreme Court have considered that the findings of the referee fail to disclose any insolvency, but, on the contrary, establish the solvency of the firm at the time the mortgages were given. We cannot concur in this view of the effect of the findings, but think that the facts found show that the firm was insolvent when the mortgages were given, and if there were any doubt upon that point, they clearly establish that the diversion of four-fifths of its properties to the individual debts of two of the partners would make it insolvent.

According to these findings, the firm was, in February, 1867, and had been from December, 1866, largely indebted and embarrassed, and the value of its property, and its consequent ability to pay its debts, depended, in part, upon the continuance and proper management of its business. The mortgages were given on the 2d and 28th of February, 1867. If they were intended to be liens upon the *corpus* of the property, as they have been treated by the referee, and not merely liens upon the surplus which should belong to the partners respectively after payment of the firm debts, it is evident, from the facts stated as existing at the time, as well as from the result, that their enforcement would prevent the firm creditors from collecting their demands out of the firm property, and that, under the principle of the cases cited, they were fraudulent and void as to such creditors. If so, the mortgagees, by purchasing at the sale under the mortgages, acquired no valid title as against such creditors, and the plaintiff was consequently not entitled to recover.

Assuming, however, that the mortgages were intended to pass merely the individual interests of the mortgaging

partners in the common stock, and for that reason were not fraudulent as to the firm creditors, then it becomes necessary to consider their legal effect upon the rights of creditors of the firm. It is clear that the remaining partner was entitled to the control of the firm property so long as he retained his interest, and to apply it to the firm debts ,and that the mortgagees acquired only a right to the surplus, if any, which would be found to belong to the mortgagors on the settlement of the accounts.

And so long as any of the partners had this dominion over the firm property, it can hardly be questioned that it was subject to levy on execution at the suit of a firm creditor. (*Lovejoy* v. *Bowers,* 11 N. H., 404; *Coover's Appeal,* 29 Penn. St. R., 9; *Pierce* v. *Jackson,* 6 Mass., 243.)

But the point upon which the judgment was sustained in the Supreme Court, at General Term, was, that after the execution of the mortgages H. E. Goodwin, the only remaining partner, made a separate transfer, to a third party, of his individual interest in the partnership properties, and, on this ground, it was held that when the execution was levied none of the defendants in the execution had any leviable interest in the property levied upon; and it was further held that the plaintiff, who had purchased the interest of S. E. Rubert, under his mortgage, was entitled, by virtue of the two mortgages and of the purchase at the sale under them, to recover the value of four-fifths of the *corpus* of the partnership property levied upon by the defendants, without regard to the partnership debts.

This position is not without authority in its support. It is founded upon the theory that the separate transfers of the individual interests of all the partners divested the title of the firm, that firm creditors have no lien upon the partnership effects and no direct right to compel their application to firm debts in preference to individual debts. That the right to compel this application is an equity vested in the partners themselves, and exists only as between each other. That so long as this equity exists in any of the

partners, the creditors have an equity to compel its enforcement between the partners, and may, by this means, obtain the application of the partnership properties to their demands, in preference to the individual debts or separate dispositions of any of the partners; in other words, "that the equities of the creditors can be only worked out through the equities of the partners." From these premises, the conclusions have been drawn that if such equities are waived or released by the partners themselves the creditors lose them, and that a transfer of the individual interest of a partner in the firm property to a third person extinguishes the equity of the partner, and consequently that of the creditors, which is dependent upon it. This doctrine has been carried to the extent of holding that if the individual interests of each of the members of a firm are successively sold under executions against such members respectively for their individual debts, the purchasers acquire the *corpus* of the property, free from the copartnership debts, and the equities of the partners and partnership creditors are extinguished. (*Coover's Appeal*, 29 Penn. St. R., p. 9.)

The injustice and it may be said, the absurdities, which result from such a view, lead to an inquiry into its correctness. A firm may be perfectly solvent though the members are individually insolvent, yet in such a case the doctrine that the property of the firm is divested, and the equities of the partners and partnership creditors are extinguished, by separate transfers of the individual interests of all partners, might result not only in an appropriation of all properties of the firm to the payment of the individual debts, to the entire exclusion of the firm creditors, but to a most unjustifiable sacrifice and waste of such properties. For instance, suppose a firm to consist of three members, each having an equal interest, and to be possessed of assets to the amount of $300,000, and to owe debts to half of that amount, the interest of each partner, supposing their accounts between themselves to be even, is $50,000. The members of the firm are individually indebted. One of them

sells his share, and receives for it $50,000, which is its actual value; the share of another of the partners is sold out under execution, and brings its full value, $50,000. Thus far one partner remains, and he has an equity to have the firm debts paid, and those who have sold out are protected against those debts. The purchasers of the separate interests are entitled to the surplus only; the joint creditors still have their recourse against the partnership property and the right to levy on such of it as is subject to sale on execution; but before any levy, the remaining partner sells out his individual interest, or it is sold out on execution. According to the doctrine applied in the present case, and maintained in the case of *Coover's Appeal* (*supra*), the firm property is, by this last sale, relieved from the partnership debts, the two shares first sold are at once changed from interests in the surplus to shares in the *corpus* of the property free from the debts, their value is doubled, and the fund which should have gone to pay the joint debts is, without any consideration, appropriated by the transferrees of the individual interests of the partners.

Such is, in substance, the operation performed in the present case. Assuming that the mortgages are intended to convey only the separate interests of the mortgagors (which, as has been shown, is the only theory upon which they can escape being regarded as fraudulent), the mortgaged property was, at the time the mortgages were given, liable to be taken for the partnership debts. The mortgages were but a slender security, and their value dependent upon the firm debts being paid. This state of affairs continued so long as Hollister E. Goodwin retained his one-fifth interest in the firm. The firm property was legally under his dominion for the payment of firm debts, and the firm creditors, if they then had their execution, could have rightfully levied upon it, or availed themselves of Goodwin's equity as to any property which must be reached in that form. But on the tenth of May, 1867, Hollister E. Goodwin made a transfer of his interest in the property of the firm to one

Mary B. Goodwin, and on the same day the plaintiff and Samuel E. Rubert took possession under their mortgages. The referee has not found what was the consideration or purpose of this assignment from Hollister E. to Mary B. Goodwin, nor has he expressly found that it was made in good faith. But the effect claimed for it is that Hollister E. Goodwin being the only remaining partner, the transfer of his interest divested him of his dominion over the partnership property, and of his equity to require the application of the partnership property to the payment of its debts, and that as the partnership creditors could only reach the property through him, he, by this transfer or surrender of his rights, had cut off their access to it, and thrown it into the hands of the transferrees of the individual partners, unincumbered by firm debts.

Waiving any question as to the *bona fides* of this transaction, the referee not having found it fraudulent, and treating the sale of Goodwin's interest as if it had been made under an execution against him, we come back to the question whether the consequences claimed do legally follow from separate sales of the individual interests of the several partners.

It would be a superfluous labor to trace the history of the changes which have, from time to time, taken place in the views of the courts respecting the nature of the interests of individual partners in the common stock of a firm, and the respective rights of separate and joint creditors; but it is sufficient to observe that they have resulted in a general recognition of the doctrine, that as between a firm and its creditors the property is vested in the firm, and that no individual partner has an exclusive right to any part of the joint stock until the firm debts are paid and a balance of account is struck between him and his copartners, and the amount of his interest accurately ascertained.

The *corpus* of the effects is joint property, and neither partner separately has anything in that *corpus;* but the interest of each is only his share of what remains after the

partnership debts are paid and accounts are taken (*West* v. *Skip*, 1 Ves. 239; *Fox* v. *Hanbury*, Cowp., 445; *Taylor* v. *Fields*, 4 Ves., 396; 15 Ves. 559, note; *Pierce* v. *Jackson*, 6 Mass., 243; *Doner* v. *Stauffer*, 1 Penn. R. [Penrose & Watts, see p. 164], 198; 2 K Com., 11th ed., p. 78, note; Collyer on Part., 3d Am. ed. [Perkins], notes to Sec. 822, pp. 704 to 710; Story on Part., notes to Secs. 261, 262, 263; *Crane* v. *French*, 1 Wend., 311; *Witter* v. *Richards*, 10 Conn., 37).

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts. (3 Kent Com., 76, 11th ed.)

Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold, and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm. (3 K. C., 78, note b, 11th ed.)

No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken. (1 Ves., 241., Am. ed., note; 15 Ves., 557.)

No person deriving under a partner can be in a better condition than the partner himself. (*Fox* v. *Hanbury*, Cowp., 445.)

A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner, of his undivided interest, cannot avail against the creditors of the partnership who attach the partnership property. (*Lovejoy* v. *Bowers*, 11 New Hamp., 404.)

These principles have been enunciated in a great number of cases where some one at least of the partners re-

tained his equity to have the firm debts paid, and the rights of the creditors to assets or proceeds, which have come under the control of a court of equity, have been worked out through the equity of that partner. But I find no case in which the consequences of transfers of the separate interests of all the partners to outside parties has been considered, except the case of *Doner* v. *Stauffer* (1 Penn. [Penrose & Watts], 198), and *Coover's Appeal* (29 Penn. St. R., 9), before referred to. In neither of these cases is the point adjudicated, for in both cases the joint creditors intervened before the sale of the interest of the last remaining partner, and their right to priority was sustained; though the opinion of the court was expressed as to what the result would have been if all the individual interests had been first sold.

There is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partnership debts in preference to the separate debts of one partner; that is where a *bona fide* sale has been made by a retiring partner, in a solvent firm of two members, to his copartner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. (*Ex parte Ruffin*, 6 Ves., 119; *Dimon* v. *Hazard*, 32 N. Y., 65.) But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the *corpus* of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united in a sale to a stranger. It remained subject to execution for firm debts so long as it continued in the hands of the purchasing partner. It is conceded that the creditors have no lien which would affect the title of a purchaser from the firm. But the question now is,

what is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third persons? Where the property remains in specie, and no act has been done by the firm to divest its title, but the partners have made separate transfers of their respective individual interests to different persons, is it still to be regarded, as to firm creditors, as firm property, or has it become the absolute property of the several transferrees of the interests of the individual partners?

It has been shown that no share in the *corpus* of the property passed by either of these transfers separately, but merely an interest in the surplus, and which should be ascertained on an accounting after payment of the firm debts. But it is claimed that, when all the partners have assigned, their interest in the property is divested, and their equity is destroyed, and, therefore, the property is released from the debts, and what was, at the time of the assignment, a share of a contingent surplus, has been converted into a share of the *corpus* of the property. Is this position sound? When a partner sells his interests in a firm to a person other than his copartner, or it is sold on execution against him, does he thereby lose all equity to have the firm debts paid out of the assets?

When he sells to his copartner he relies upon his assumption of the partnership debts, and unless he stipulates for an application of the assets to that purpose, he parts with all lien upon them. But when he sells to a stranger not liable for the debts, or his interest is sold on execution, is not the right to have the debts paid out of the property a right of indemnity personal to himself, and which does not pass by the sale? Could it be tolerated that the interest of a partner should be sold under execution against him, on which sale only the value of his interest in the surplus could be realized, and that the purchaser should be allowed to take the *corpus* of the property and leave him liable for the debts? If the legal effect of the

transfer were set forth in the instrument, it would be seen that all the purchaser acquired was a right to an account, and to the partner's share in the surplus, after payment of the debts when ascertained, and that he had no right to that part of the property which was required for the payment of debts; that the sale was subject to the debts. (3 K. Com., 76-78.) The partner whose share was sold would manifestly have an interest in the protection and appropriation of that part of the property in discharge of his own liability to the firm creditors.

I do not see how this right can be affected by the question whether the separate interests of all or only one of the partners is thus sold. Each of the purchasers would acquire an interest merely in the surplus, and each partner whose interest was sold would have the right to indemnity against the firm debts by the application to such debts of so much of the property as might be necessary for the purpose. These debts must have been taken into consideration in fixing the price of the interest sold, and consequently allowed to the purchaser, and the partnership assets are the primary fund for their payment. The case differs materially from a sale by a retiring copartner to his copartner, who is personally liable for the debts directly to the creditors; but even such a sale is valid only when there is no insolvency at the time. To sell to an insolvent partner would be a clear fraud. How much more clearly apparent would be the injury to creditors by a sale to a person not liable for the debts, if such sale had the effect to relieve the property from them.

It can hardly be necessary, where the firm property remains in specie and is tangible and capable of being levied upon, to resort to the equities of the partners in case there has been no transfer by the firm, and the only adverse claimants are assignees of the individual interests of the several partners for their separate debts. The right of the firm creditor to levy on property thus situated can be sustained on two grounds. If the effect of any of these

transfers is to divest the title of the firm, then, if effected by the acts of the partner, they are clearly fraudulent and void as to firm creditors, as is shown in the cases of *Ransom* v. *Van Deventer* (41 Barb., 307) and *Wilson* v. *Robertson* (21 N. Y., 587). An appropriation to the individual debt of one partner of any part of the firm property, even with the assent of his copartners, is illegal and void, provided the firm is not left with sufficient to pay its debts. How absurd it would be to hold that all of the partners, by making separate assignments of their respective shares in the firm property to their individual creditors, could effectually divest the firm of all its property and apply it to their individual debts, leaving nothing for the partnership creditors. But the simple solution of the question is to hold that the title of the firm, as between it and its creditors, to the *corpus* of the property, or at least to so much of it as is necessary for the debts, is not divested by these separate transfers to strangers.

As is stated by Prof. Parsons, in his work on Partnership (chap. 10, sec. 1, pages 356 to 362, 2d ed.), a partnership, though neither a tenancy in common nor a corporation, has some of the attributes of both. The well established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership, is derived from the acknowledgment that a partnership is a body by itself. In its relation to its creditors it is placed upon the basis of having its own creditors and possessing its own property, which it applies to the payment of its debts, and after this work is done, there is a resolution of the body into its elements.

Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individ-

ual shares by the several partners can convey a good title to the whole property free from the joint debts, would be to return to the doctrine, long since exploded, that partners hold by moieties as tenants in common. In the present advanced stage of the law upon this subject, no established rule is violated by holding that the title of the firm, as between it and its creditors, cannot be divested by the acts of the partners severally, not in the business of the firm, nor by the separate creditors of members of the firm (further than such temporary interruption of the possession as may be necessary to enable the officers of the law to make an effectual sale of the interest of the debtor partner). This view does not recognize any lien of partnership creditors upon the firm property. The firm have power to dispose of it without regard to the creditors, provided the disposition be not fraudulent. But the individual members or their creditors ought not to have any such power, and all transfers made by them for individual purposes should be held inoperative upon the *corpus* of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners separately, than when made by a portion of them, but the property should be deemed to continue in the firm until its title has been divested by some act of the firm.

My conclusion is that, as between the firm of J. C. Smith & Co. and its creditors, the property levied upon by the defendants remained the property of the firm, and subject to levy on execution against it, notwithstanding the transfers by the several partners of their respective individual interests.

I have not adverted to the changes which took place in the firm by the retirement of John Wride and M. Huntington, and the transfer by them of their interests to J. C. Smith, intermediate the contracting of the debt to the Bank of Geneva and the levy, the effect of these changes being

fully considered in the opinion of my learned associate, Allen, J.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.[2]

Judgment reversed.

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[2] The concurring opinion of Allen, J., is omitted. All the other members of the court, except Folger and Andrews, JJ., not sitting, concurred in both opinions.

CASE *v.* BEAUREGARD.

IN THE SUPREME COURT OF THE UNITED STATES, 1878.

99 United States Reports, 119.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This suit was brought July 10, 1869, by Frank F. Case, receiver of the First National Bank of New Orleans, against Gustave T. Beauregard, Thomas P. May, Augustus C. Graham, George Binder, Alexander Bonneval, Joseph Hernandez, the New Orleans and Carrollton Railroad Company, and the Fourth National Bank of New York, to recover a debt of $237,000.89, which he claimed was due from, and had been contracted by, Beauregard, May, and Graham, while they were partners, and carrying on business as such; and to have certain transfers of partnership property set aside and subjected to the payment of the debt.

On the 8th of May, 1867, Graham, one of the partners, assigned all his right and interest in any property and effects of the partnership, and whatever he might be entitled to under the articles thereof, together with all debts due to him from the partnership or any member thereof, to the Fourth National Bank of the City of New York. By subsequent assignments, made on the 14th and 16th of May, 1869, May, the second partner, transferred all his interest in the partnership property to the United States, and by the same instruments transferred to the United States, by virtue of a power of attorney which he held, the interest of Graham. On the 21st of August, 1867, the United States sold and transferred their interest obtained from May and Graham in all the partnership property, including real estate, to Alexander Bonneval, Joseph Hernandez, and George Binder. On the 15th of October next following, an act of fusion was executed between the New Orleans and Carrollton Railroad Company, Beauregard,

Bonneval, Hernandez, and Binder, by which the rights of all the parties became vested in the railroad company, subject to the debts and liabilities of the company, whether due or claimed from the lessee or the stockholders.

The complainant charges that the First National Bank, being the creditor of the partnership, had a lien or privilege on its effects, and was entitled to be paid therefrom to the exclusion of the creditors of any member of the partnership; that the partnership was insolvent; that none of its members was able to pay his individual debts, or authorized to dispose of the partnership property for the payment of such debts; that the deed to the United States, its deed to Binder, Bonneval, and Hernandez, and the deed of the latter parties and Beauregard to the railroad company, are in fraud of the rights of the bank as a creditor of the partnership, and that the same should be cancelled and the partnership property sold to satisfy the prior and privileged claim of the bank. He prays that Binder, Bonneval, Hernandez, and Beauregard be enjoined from transferring or incumbering their stock in the company, and that the latter be enjoined from recognizing or permitting such transfer, and for general relief.

The bill was dismissed on a final hearing, and the complainant appealed here.[1]

Mr. Justice Strong delivered the opinion of the court.[2]

The object of this bill is to follow and subject to the payment of a partnership debt property which formerly belonged to the partnership, but which, before the bill was filed, had been transferred to the defendants. There is little if any controversy respecting the facts, and little in regard to the principles of equity invoked by the complainant. The important question is, whether those principles are applicable to the facts of the case.

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[1] The Reporter's statement of the facts of the case is abbreviated, and his notes of the argument of counsel for the appellant omitted.

[2] Judge Strong's statement of the facts of the case having been used in the statement just given is omitted from the opinion.

No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege of preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice v. Barnard, et al.*, 20 Vt. 479; *Appeal of the York County Bank*, 32 Pa. St. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.

It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*. Other

property can be followed only after a judgment at law has been obtained and an execution has proved fruitless.

So, if before the interposition of the court is asked the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex parte Ruffin* (6 Ves. 119), where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not *mala fide*. *Kimball* v. *Thompson,* 13 Metc. (Mass.) 283; *Allen* v. *The Centre Valley Company, et al.,* 21 Conn. 130; *Ladd* v. *Griswold,* 9 Ill. 25; *Smith* v. *Edwards,* 7 Humph. (Tenn.) 106; *Robb and Others* v. *Mudge and Another,* 14 Gray (Mass.), 534; *Baker's Appeal,* 21 Pa. St. 76; *Sigler & Richey* v. *Knox County Bank,* 8 Ohio St. 511; *Wilcox* v. *Kellogg,* 11 Ohio, 394.

The joint estate is converted into the separate estate of the assignee by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under a judgment against him. In either case his equity is gone. These principles are settled by very abundant authorities. It remains, therefore, only to consider whether, in view of the rules thus settled and of the facts of this case, the complainant, through any one of the partners, has a right to follow the specific property which formerly belonged to the partnership, and

compel its application to the payment of the debt due from the firm to the bank of which he is the receiver. * * *

The effect of these transfers [by the individual-partners] and act of fusion was very clearly to convert the partnership property into property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased. *Baker's Appeal*, 21 Pa. St. 823. That was a case where a firm had consisted of five brothers. Two of them withdrew, disposing of their interest in the partnership estate and effects to the other three, the latter agreeing to pay the debts of the firm. Some time after, one of the remaining three sold his interest in the partnership property to one of the remaining two partners. The two remaining, after contracting debts, made an assignment of their partnership property to pay the debts of the last firm composed of the two; and it was held that the creditors of the first two firms had no right to claim any portion of the fund last assigned, and that it was distributable exclusively among the creditors of the last firm. So in *McNutt* v. *Strayhorn & Hobson* (39 *id.* 269), it was ruled that though the general rule is that the equities of the creditors are to be worked out through the equities of the partners, yet where the property is parted with by sale severally made, and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and, therefore, there is no case for the application of the rule. See also *Coover's Appeal*, 29 *id.* 9. Unless, therefore, the conveyances of the partners in this case and the act of fusion were fraudulent, the bank of which the com-

plainant is receiver has no claim upon the property now held by the New Orleans and Carrollton Railroad Company, arising out of the facts that it is a creditor of the partnership, and was such a creditor when the property belonged to the firm.

The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors,—a fraud which those partners could waive, and which was subsequently waived by the act of fusion. Besides, that act made provision for some of the debts of the partnership. And it has been ruled that where one of the two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sale and conveyances are not *prima facie* void, as against creditors of the firm, but are *prima facie* valid against all the world, and can be set aside by the creditors of the firm only by proof that the transactions were fraudulent as against them. *Kimball* v. *Thompson*, 13 Metc. (Mass.) 283; *Flach et al.* v. *Charron et al.*, 29 Md. 311. A similar doctrine is asserted in some of the other cases we have cited; and see 21 Conn. 130. In the present case we find no such proof. We discover nothing to impeach the *bona fides* of the transaction, by which the property became vested in the railroad company.

Thus far we have considered the case without reference to the provisions of the Louisiana Code, upon which the appellant relies. Art. 2823 of the Code is as follows: "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner." We do not perceive that this provision differs ma-

terially from the general rule of equity we have stated. It creates no specific lien upon partnership property, which continues after the property has ceased to belong to the partnership. It does not forbid *bona fide* conversion by the partners of the joint property into rights in severalty, held by third persons. It relates to partnership property alone, and gives a rule for marshalling such property between creditors. Concede that it gives to joint creditors a privilege while the property belongs to the partnership, there is no subject upon which it can act when the joint ownership of the partners has ceased. Art. 3244 of the Code declares that privileges become extinct "by the extinction of the thing subject to the privilege."

What we have said is sufficient for a determination of the case. If it be urged, as was barely intimated during the argument, that the property sought to be followed belongs in equity to the bank, or is clothed with a trust for the bank, because it was purchased with the bank's money, the answer is plain. There is no satisfactory evidence that it was thus purchased. It cannot be identified as the subject to the acquisition of which money belonging to the bank was applied.

The bank has, therefore, no specific claim upon the property, nor is there any trust which a court of equity can enforce; and it was well said by the circuit justice, that, without some constituted trust or lien, "a creditor has only the right to prosecute his claim in the ordinary courts of law, and have it adjudicated before he can pursue the property of his debtor by a direct proceeding" in equity.

Decree affirmed.

THAYER *v.* HUMPHREY.
DAVIES *v.* HUMPHREY.

In the Supreme Court of Wisconsin, 1895.

91 *Wisconsin Reports, 276.*

A. J. Goss and J. D. Putnam were partners, under the firm name of J. D. Putnam & Co. The firm was insolvent. It was dissolved, J. D. Putnam selling out his interest, with the understanding that the business should be continued by a new firm known as J. B. Goss & Co. The consideration for the sale on Putnam's part was that the new firm should assume and pay all the old firm debts. He supposed that J. B. Goss was the real purchaser, though the transfer was made to A. J. Goss, who shortly after transferred to J. B. Goss. The new firm was advertised as J. B. Goss & Co., and no notice was given of any change from the old firm other than what was indicated in the change of the firm name. A. J. Goss in fact dropped out; so that J. B. Goss became sole proprietor, but A. J. Goss was still held out as a partner in such a way as to make him liable for all the debts of J. B. Goss & Co. The ostensible firm actually assumed, by agreement with the creditors, nearly all the debts of the old concern, and among them the debt of the appellant Lottie Thayer, but did not so assume the debt of the appellant Davies. Such ostensible firm also incurred other obligations. It was insolvent from the start, and, in the course of events,—in effect, by the act of J. B. Goss,—made an assignment for the benefit of creditors; and A. J. Goss, being insolvent, made an assignment for the benefit of creditors as well. There was then, in fact, no firm, though there was an ostensible firm; no firm assets, strictly so called, because there was no firm in fact; yet there were assets that were owned and used in the business of the

ostensible firm of J. B. Goss & Co., and that passed into the possession of the assignee of J. B. Goss,—hence assets of the ostensible firm. There is no living solvent partner.[1]

MARSHALL, J.: Now, in this situation, can the creditors of J. B. Goss, doing business as J. B. Goss & Co., who were so circumstanced as to be entitled to hold J. B. Goss and A. J. Goss liable as members of an ostensible firm,—and all the creditors, at least of the new concern, including those having claims against the old firm that, by arrangement with them, have been assumed and made debts of J. B. Goss & Co., are so circumstanced in fact,— prove their claims *pari passu* with the individual creditors of A. J. Goss in his assignment? Also, can the creditors of the firm of J. D. Putnam & Co. so prove?

This presents interesting questions of law, some of which have not heretofore been presented to or decided by this court,—questions upon which there is such conflict of authority in this country that the true rule to be adopted has not been arrived at without difficulty, and then not with the unanimous decision of the court, which is to be regretted. Nevertheless, after careful consideration of the state of the law as held by the courts of this country and of England as well, we have, as we believe, reached a conclusion thoroughly grounded in the well recognized principles of equity jurisprudence, which should be applied in the progressive spirit that ever has and should ever characterize the growth and application of such principles. They should not only not be lost sight of, but they should not be fenced in and restricted within such narrow limits as to lead to a suspicion of their correctness, but should be applied on such well-defined lines as to leave no doubt in respect to their true character and scope.

There are several propositions of law that apply which are well established,—too well to need to be more than

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[1] The facts as stated have been in part taken from the statement of Marshall, J., and in part from the statement of facts made by the Reporter.

stated,—among which are that the assets of an insolvent partnership, in insolvency proceedings, must be applied first to the payment of the partnership debts; that, generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner; that the fixed rule is that joint estate must go to joint creditors, and separate estate to separate creditors, though the former may prove *pari passu* with separate creditors when there is no living solvent partner and no partnership assets.

Now, in this case there is no solvent partner. J. D. Putnam, J. B. Goss, and A. J. Goss are all insolvent. So, keeping in mind the above stated propositions of law, the vital question is, Are there any partnership assets to which appellants can resort? If there are such, then the foundation stone, upon which they construct their claim of right to share *pari passu* with the individual creditors of A. J. Goss, disappears.

On that subject we shall not attempt to harmonize the large number of cases that can be found in this country. The simple question of whether, when there is an ostensible firm by holding out to creditors generally, the property of such firm is to be considered, in equity, joint property for the administration thereof in insolvency, the same as if such property belonged to a firm in fact, is the key to the situation. That it ought to be so considered is, we assume, too clear for argument; that is to say, if A and B do business with persons generally as A & Co., and incur liabilities to such persons who deal in good faith, believing that there is a firm in fact as well as in name, and under such circumstances that they have a right to believe it is composed of A and B, and the business becomes insolvent, the property of the ostensible firm should be considered, to all intents and purposes, in regard to the administration of the business in insolvency under the control and direction of a court of equity, the same as if they were partners in fact. The doctrine that estops B from saying that he is not a partner of A at the suit of the creditors of the ostensible

firm, should estop A from holding that the property is his individual property to the prejudice of those who dealt with the firm as a firm in fact, and should estop the creditors of the ostensible firm, in the case of the bankruptcy of such firm, from resorting primarily to the individual property of the members of such firm; in short, should work effectually to compel liquidation in all respects the same as if the members of such firm were just what they seem to be. This is what the doctrine of estoppel is for; that is what equity is supposed to accomplish,—to prevent fraud and promote justice between man and man in the administration of human affairs. And we are therefore prepared to find that such is the law as substantially declared by the court of appeals in chancery of England.

In *In re Rowland & Crankshaw,* 1 Ch. App. 421, the precise question here under consideration was presented. The business was conducted in the name of Rowland & Co. Crankshaw was held to be the ostensible partner, in a contest to determine whether the property should be administered in bankruptcy as joint property of Crankshaw and Rowland, partners, or as the individual property of the one who was the actual owner. The opinion of the court, which, being short, can best be stated by quoting it in full so far as relates to the particular question under consideration, is by Lord CRANWORTH, as follows:

"In the administration of bankruptcy it has been the object from the earliest times to apportion the assets as fairly as possible between the joint and separate creditors. There is found much difficulty in doing this satisfactorily, but some rules have been clearly laid down, for instance, that the joint property pays the joint creditors, and the separate property pays the separate creditors. Now, what is said here is that this estate, though said to be joint, is in fact separate. These two gentlemen traded under the name of Rowland & Co., and tradesmen supplied them with large quantities of goods, and then they became bankrupts, and it is now said that they were not partners, and that the real

arrangement between them was that everything belonged to Crankshaw. That is no reason; and, as Crankshaw suffered Rowland to trade in the name of the firm, any persons trading with him are entitled to say that Rowland & Crankshaw are the persons with whom they dealt and that the goods are joint goods."

This is a most concise statement of the law, as held by the English court of chancery. The meaning is too plain and unmistakable to leave any room for discussion, and we find that the rule so tersely stated has been adhered to and repeatedly approved in subsequent cases in language rather tending to extend than restrict the principle involved. In *Ex parte Sheen* (*In re Wright*), 6 Ch. Div. 235, the question was again before the court, where the circumstances were that there was no general holding out, and the court held that where there is no ostensible partnership by a holding out to creditors generally, but only a holding out to two or three creditors, the facts are not sufficient to make the property of the alleged ostensible firm joint estate. This, though not referring to, inferentially approves *In re Rowland & Crankshaw*. In *Ex parte Hayman* (*In re Pulsford*), 8 Ch. Div. 11, the question again came before the court of chancery, on appeal from the chief judge in bankruptcy, and *In re Rowland & Crankshaw* was expressly approved. The case so clearly covers the two cases under consideration that we quote liberally from the opinion, after stating the facts. Such facts are as follows:

Prior and up to August 31, 1875, Hayman, Catford, and Pulsford carried on business as Hayman, Pulsford & Co. On that date the firm was dissolved and notice was published stating the fact. At the same time a letter was sent to each of the persons with whom the firm had done business, stating the fact of dissolution and that thereafter the business would be carried on by Thomas Pulsford, under the style of Pulsford, Son & Co. Thereafter the business was so conducted. Tom Pulsford, the son of Thomas Pulsford, took an active part in conducting the business up

to the time the insolvency occurred, when Thomas Pulsford filed a petition in bankruptcy; and on the suggestion that, on account of the way the business had been conducted, it might be held that the father and son were partners, a petition was also filed by them as joint traders. The creditors resolved upon a liquidation by arrangement, and such resolution was registered. Hayman, a separate creditor of the father in respect to matters outside the firm of Pulsford, Son & Co., appealed from the order for a liquidation of the business as that of a firm, on the ground that there was no partnership. He prevailed, and the registration was canceled, and the decree was not appealed from. Thereafter the father and son signed a declaration of insolvency, upon which Ravenscroft, a creditor, presented a petition alleging that they had treated father and son as partners, under the firm name of Pulsford, Son & Co., on which an adjudication was made against them by consent. Hayman then appealed to the court to annul the adjudication. *On this application, following In re Rowland & Crankshaw, the application was dismissed on the ground that, though no actual partnership had subsisted between father and son, yet the son had been held out as a partner to the petitioning creditor to such an extent as to enable him to maintain the adjudication.* This decision was not appealed from. Hayman then applied to the court for an order declaring that all, or such portion as the court should think proper, of the estate which appeared in the acts of the bankrupt or either of them as joint estate, formed part of the separate estate of the father, and for a direction that the trustee should treat the same accordingly as separate estate of the father. Hayman was the only separate creditor, that is, creditor outside those of the business of Pulsford, Son & Co. On the hearing the evidence showed that substantially all the creditors did business with Pulsford, Son & Co. as a firm consisting of the father and son, though it appeared that the father was the actual owner of the business and that there was no firm in fact. Hayman's application was

refused, and he appealed. On the hearing of this appeal in the chancery division of the high court of justice, JAMES, L. J., propounded to appellant's counsel the following interrogatory: *"If I go to a shop, and find the names Thompson & Jones on the door, and I go in and find Thompson and Jones selling goods, am I not warranted in believing that they are partners?"* to which answer was made in effect: *"That would not change the nature of the assets, and make property which belonged to the father in fact the joint property of father and son,"*—just as it is claimed in this case, it will be observed. Appellants contend that *the fact of holding out sufficient to constitute an ostensible firm of J. B. Goss & Co. will not change the nature of the assets so as to make the individual property of J. B. Goss joint property, in equity, of J. B. Goss & Co.* The positions are identical. In the opinion of the court this is answered by JAMES, L. J. After reciting the facts in *In re Rowland & Crankshaw*, as in Lord CRANWORTH'S opinion in that case, he says:

"Every point of that judgment applies to this case, with this single exception, which fact is in favor of the decision of the registrar, that, instead of the words used being '& Co.,' which is an ambiguous term and might mean anybody in the world, the words are 'Pulsford, Son & Co.' But it is said that this conclusion will work hardship to the appellant, who is a creditor of the father alone. I think that is only one of those misfortunes which occur to persons who deal with others who afterwards become insolvent and become bankrupt, having partners. *The hardship would have been exactly the same upon Hayman if there had been a real partnership created by a formal instrument. The same consequences would then have happened as happen where there is only an ostensible partnership.*" It will be distinctly noted at this point that the court makes no distinction in the administration of estates of an ostensible and an actual firm in bankruptcy. The lord justice proceeds: "The rule has been established that joint creditors take the

joint estate and separate creditors take the separate estate, and you only have to consider what is joint and what is separate estate, and you must apply the rule independently of the hardship. The supposed hardships are those which it may inflict in any particular case. We can only apply the fixed rule that that which is joint estate shall go to the joint creditors, and that which is separate estate shall go to the separate creditors."

The reasoning of these cases is, in our opinion, unanswerable, and we deduce therefrom the principle of law that, if a person allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in fact the property with which such business is carried on, though in law that of such person, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in competition with the creditors who have trusted the two as partners and the business as that of the two. To the same effect is *Van Kleeck* v. *McCabe*, 87 Mich. 599. Applying the law thus stated to the question under consideration, the conclusion is easily reached that, while there are no firm assets at law of the ostensible firm of J. B. Goss & Co., all the property used by J. B. Goss in conducting the business, in equity, is the joint property of such ostensible firm, and to it all the creditors of such ostensible firm can resort, the same in all respects as if there had been a firm in fact.

This effectually disposes of the appeal of appellant, Lottie Thayer, though it is as effectually ruled by the law applicable to the Davies appeal, as will appear by what follows. Appellant Davies never became a creditor of J. B. Goss or of J. B. Goss & Co., by any agreement to which he was a party; and, while his appeal presents the question of whether there is any joint property to which he can resort,

such question involves a different question from the one discussed as particularly applicable to the Thayer appeal.

We must start the discussion of the Davies appeal with the propositions of law—in respect to which, though there is some conflict, they are too well established by the great weight of authority to be questioned by this court—that partnership creditors have no lien on the partnership assets independent of the equity of the partners, but must work out their preference over the individual creditors of the members of the partnership through the equities of such members; that, so long as the equity of the individual members of the partnership exists to have the partnership property applied to the partnership debts, the creditors have the equity to compel its enforcement; that if one member sells his interest, *bona fide*, to his copartner or a stranger, without in any way retaining his equity to have the partnership creditors paid out of it, the joint property is thereby converted into the individual property of the purchaser. The question to be determined is, in view of the facts that the sale was made by Putnam in consideration of the debts of the partnership being paid; that the firm was insolvent at the time; that the whole transaction was really made by him to relieve himself from the partnership liability; that the property was put into the possession of J. B. Goss for the purpose of continuing the same business with the same assets and effecting a settlement of the old partnership affairs,—all of which clearly appears, Can it be held that the equitable title to the property was changed, so as to affect the equitable right of Putnam to have the creditors of the old firm paid out of it, or were the equitable rights of the outgoing partner and the creditors preserved by reason of the facts, and the assets in the hands of J. B. Goss impressed with a trust to carry out the intention of the parties?

In discussing these questions, full effect should be given to the significant controlling words in the rule, correctly stated in *Willis* v. *Thompson,* 85 Tex. 301, "without

preserving the lien in any manner." In *Conroy* v. *Woods,* 13 Cal. 626, it was held that where a sale is made by one partner to his copartner, and the consideration for the sale is the payment of the partnership debts, the sale is not *bona fide* and within the meaning of the rule, so as to cut off the equity of the vendor to have the property applied to the payment of the partnership debts. Very few cases can be found that go as far as the California court on this subject, except in the New Hampshire court, which does so, holding that the creditor has an equitable interest independent of the equity of the individual partner. In *Ex parte Cooper,* 1 Mont., D. & D. 358, and *Ex parte Williams,* 11 Ves. 3, it is held that where an outgoing partner sells *bona fide* to his copartner, and takes for his consideration an agreement that the purchaser shall pay the debts, no equitable interest in the property is retained. To the same effect are *Stanton* v. *Westover,* 101 N. Y. 265; *Fulton* v. *Hughes,* 63 Miss. 61; *Dimon* v. *Hazard,* 32 N. Y. 65; and many other cases that might be cited. In *Darby* v. *Gilligan,* 33 W. Va. 246, it is held that where a firm is insolvent, if a partner sells out to his copartner, and the purchaser agrees to pay the firm debts, the sale cannot be considered *bona fide,* so as to cut off the equity of the firm creditors to be preferred; and to the same effect is *Olson* v. *Morrison,* 29 Mich. 395. In the latter case Olson and Jones were partners. Olson sold out to Morrison, the consideration being that the vendee should pay the debts of the firm. It sufficiently appears that the firm was insolvent. The vendee neglected to comply with his agreement, and the creditors, joining with the vendor, brought suit to compel performance of the agreement and to subject the property to the payment of the partnership debts. *Held,* that the agreement to pay the debts as consideration for the transfer was a sufficient recognition of the equitable lien of the partnership creditors, tracing the same through the equity of the vendor, to enable them, joining with him, to enforce such equity.

In *Menagh* v. *Whitwell*, 52 N. Y. 146, it was held that, as between the firm and its creditors, the title of the former to the joint property is not divested by any separate transfers to outside parties for the individual benefit of the respective vendors, and that, when there has been no transfer by the firm as such, conveying the *corpus* of the property, and it remains *in specie*, though transferred by the separate transfers of the individual members, it may yet be followed and reached in the hands of those claiming under such separate transfers, by creditors of the firm. This is upon the theory that neither partner separately has any interest in the *corpus* of the property; that his interest is limited to his proportionate share of what remains after a settlement of all partnership obligations and an accounting between himself and his copartner. A distinction is drawn in this case between a *bona fide* sale by one of a partnership to two of his copartners without reservation, which, under the prevailing rule of *Ex parte Ruffin*, 6 Ves. 119, operates to liberate the assets from the partnership liability, and a sale made by one member of a firm of more than two, to one of the partners, or to an outside party. In that class of cases the New York courts have uniformly held, since *Menagh* v. *Whitwell*, that the partnership effects are not liberated from the partnership liability. In this case, if it is held that the sale was really to J. B. Goss, under the New York rule the *corpus* of the property never passed by any act of the firm so as to change the equitable title in respect to creditors existing at the time of the sale.

The trend of the New York cases since *Menagh* v. *Whitwell* has been to extend the rule which preserves the equity of the creditors in case of the sale by one of the members of an insolvent firm, the purchaser assuming the partnership obligations in place of the outgoing partner, whether such sale is to a copartner or otherwise. This clearly appears by the following, from the opinion in *Bulger* v. *Rosa*, 119 N. Y. 465: "The equity of the firm creditors cannot be defeated by any attempted conversion of

the assets of the insolvent firm into the individual assets of one of the partners, through a transfer by one partner of his interest therein to the other. In such a case, till the assets come to the hands of a *bona fide* purchaser, the same can be reached by the partnership creditors." To the same effect are *Nordlinger* v. *Anderson*, 123 N. Y. 544, and *Peyser* v. *Myers*, 135 N. Y. 599. In the latter case there had been a change in the firm some time prior to the assignment for the benefit of creditors, the new firm not having made any express contract to pay the old firm debts. There were two sets of creditors, and, in discussing the subject of their equitable rights, the court said: "The priority of the lien of firm creditors is not divested by the transfer by an insolvent firm of the assets to one or more of the partners, nor can it be affected by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm or the introduction of another." See, also, *Phelps* v. *McNeely*, 66 Mo. 554, where it was held that if a partner sells out his interest in the firm to his copartner, who agrees to pay the debts, the firm being at the time insolvent, the equities of the creditors are preserved. The evidence in that case tended to show that there was no property, other than that formerly belonging to the partnership, out of which the firm debts could be paid; but it does not clearly appear whether the court rested its decision on the ground that there was an implied promise under the circumstances to pay the firm debts out of the partnership assets, or on the ground that the insolvency of the firm impeached the *bona fides* of the transaction. The court went further, and held that, notwithstanding the vendee of the property had turned the same out to secure his individual creditors, who had received it as security in good faith, it could nevertheless be reached by the partnership creditors; but this was subsequently overruled in *In re Edwards: Goddard-Peck Grocery Co.* v. *McCune*, 122 Mo. 426.

We might go on at great length reviewing decisions on this subject, and cite numerous authorities where outgoing

partners have been held to retain their equity to have the firm debts paid, and the rights of the creditors to the assets which have come under the control of equity have been worked out through the equity of such partners. Probably there are few questions upon which there is such a conflict of authority as the one under consideration; but nearly all are in harmony with the principle that if the *bona fides* of the transaction is impeached, or if the equity is retained by agreement, express or implied, then the creditors can enforce such equity. The conflict chiefly arises in regard to what circumstances or facts are sufficient to impeach the good faith of the transaction, and in respect to what is sufficient to show a contract that the partnership debts shall be paid out of the partnership assets, and impress a trust upon such assets for that purpose.

By the mere fact of the dissolution of a partnership by one member selling out to his copartner or to a stranger, the purchaser or purchasers agreeing, as consideration for the purchase, to pay the partnership debts, the firm being insolvent at the time, no presumption of a *bona fide* agreement arises which will operate to change the equitable title of the property; and such agreement must clearly appear to exist inconsistent with the continuance of the equitable rights of the partner, and, through him, of the partnership creditors; else it is retained. Lindley, Partn. 699. If the circumstances are such as to show that the property was merely transferred for the purpose of winding up the affairs of the concern, there being no express agreement that the property shall be exclusively that of the vendee, it will, in case of bankruptcy, be distributed as joint estate. Lindley, Partn. 699, 700. This is upon the presumption that such was the intention of the parties. The presumptions to be indulged in, in such cases, rather go to support an implied agreement to do what in equity and good conscience the parties ought to do. In *Sedam* v. *Williams*, 4 McLean, 51, and *Marsh* v. *Bennett*, 5 McLean, 117, it was held that the equity was retained to have the partnership creditors

paid out of the partnership assets, and that such assets were impressed with a trust for that purpose by virtue of an express agreement. In *In re Dawson*, 59 Hun, 239, which does not appear to have been appealed from or criticised, it was held that where one member of a firm retires, selling out his interest to a third party, who continues the business with the remaining partner, with whom he enters into partnership, and the partnership assumes the debts of the previous firm, and such new firm becomes insolvent and makes an assignment for the benefit of creditors, the property transferred to the new firm becomes charged in equity with a trust for the payment of the debts of the old firm, which the outgoing partner may enforce. Such holding is certainly equitable and just when applied to a state of facts, as in this case, which leaves no room for doubt but that it was the intention of all the parties dealing with the property to preserve and administer the partnership assets in the nature of a trust to liquidate the old debts; and to this extent we expressly approve of and apply it here.

This does not in the least trench upon the rule that if a partner sells out, *bona fide*, his interest in the partnership assets and business, without in any manner retaining his equity to have the partnership creditors paid out of such assets, he waives his equity in that regard, but is perfectly consistent with it. If the agreement was express that the debts shall be paid out of the assets, then the equity is retained by express contract; if the circumstances of the transaction show that the contemplation of the parties was that the debts should be so paid, then the equity is retained by implied agreement; and the assets are, in the administration of the affairs of the purchaser in insolvency, as effectually impressed with a trust in favor of the vendor and, through him, the creditors of the old partnership, in the one case as in the other. The circumstances involved in these appeals point unerringly to the conclusion that it was the intention of J. D. Putnam, J. B. Goss, and A. J. Goss that the new concern of J. B. Goss & Co. should continue the

old business with the same assets, for the primary purpose of winding up such business and liquidating the debts theretofore contracted in it out of the old assets, so far as practicable. Hence the court below, sitting as a court of equity in the administration of the affairs of A. J. Goss and J. B. Goss, was warranted in concluding that the property of J. B. Goss is impressed with a trust to carry out the intention of all the parties concerned in the dissolution of the old firm and formation of the new concern of J. B. Goss & Co., that the debts of the old firm should be assumed by the new concern and be paid out of the property turned over to it and the operations of the business, so far as this can be done with due regard to the equities of the creditors who trusted such new concern.

On the subject of whether the two sets of creditors—those of the old firm of J. D. Putnam & Co., and those of the ostensible firm of J. B. Goss & Co.—can all prove in the insolvency proceedings of J. B. Goss, though that subject need not be decided here, we cite *Ex parte Chuck* (*In re Starkey & Whiteside*), 8 Bing. 469, an early English case, which covers the subject; and, so far as we are able to find, it has never been criticised or overruled. The facts were that S. & S. had been doing business for some time as copartners, and were, as such, indebted to various persons. They took in W., and thereafter the business was conducted by S., S. & W., as copartners. The new firm became bankrupt, and there were creditors of both the old and the new firm as well. The court held substantially as follows: "We are of the opinion that the creditors of S. & S. and those of S., S. & W. should be admitted to prove *pari passu* upon the joint assets of the new firm." To the same effect is *Frow, Jacobs & Co.'s Estate,* 73 Pa. St. 459. Foresman sold out his interest in an existing firm, having creditors, to the remaining members, who agreed to pay the debts. The vendees continued business as a firm with the same assets for a time, and finally made an assignment for the benefit of creditors. Held that the two said creditors—

those of the old firm and those of the new firm—might prove *pari passu* against the assets of the new firm; That Frow, Jacobs & Co. were liable for the debts as partners in the firm of Foresman & Co., which they took upon themselves when Foresman retired from the firm and they continued the business. When Foresman sold out, the purchasers intended to continue the business. They took all the assets and assumed the debts. The assets became the capital of the new firm, and the old debts became its debts. Under these facts, the court readily reached the conclusion that the creditors of the old and of the new firm should stand on an equal footing in the settlement of the new firm in bankruptcy. To the same effect are *In re Dawson*, 59 Hun, 239; *Shedd* v. *Bank of Brattleboro*, 32 Vt. 709; *Filley* v. *Phelps*, 18 Conn. 294; and *Wright* v. *Carman*, 19 N. Y. Supp. 696. Held, in latter case, and in *Frow, Jacobs & Co.'s Estate, supra*, and *In re Dawson, supra*, that the debts of the old became, by reason of the facts, the debts of the new firm. To the same effect is *Peyser* v. *Myers*, 135 N. Y. 599, where it is distinctly held that if there is a change in the personnel of an insolvent firm, and it subsequently makes an assignment for the benefit of the creditors,—there being an agreement, express or implied, at the time of the change, that the new firm shall assume and pay the old debts,—the equity of the old creditors is equal to that of the new. There was no express agreement in that case, but the court held that there was an implied agreement.

This effectually disposes of all the questions presented, and leads to the conclusion that neither of the appellants can prove *pari passu* with the individual creditors of A. J. Goss in his assignment, but they can both prove *pari passu* with all the creditors of the ostensible firm of J. B. Goss & Co., in the assignment of J. B. Goss.

This opinion has been quite lengthy, but it may be well justified from the importance of the questions involved. In reaching the conclusion arrived at by the majority of the court, we resort to cases merely to determine what well-

defined principles have been established applicable to the facts of the appeals before us. Having come to a satisfactory conclusion in that regard, we endeavor to broadly apply them so as to satisfy effectually the ends of justice, which are obviously the legitimate ends for which such principles have been worked out in the growth of equity jurisprudence. By so doing the assets of J. B. Goss, held and used by him as those of the ostensible firm of J. B. Goss and A. J. Goss, will be marshaled and administered along definite lines, without confusion or uncertainty as to the rights of the various sets of creditors and parties interested.

In order, now, that the principles of equity jurisprudence here applied may definitely appear, we recapitulate as follows:

1. In the administration of the affairs of a partnership and of the individual members thereof, the fixed rule must be applied that joint estate goes first to joint creditors, and separate estate to separate creditors, with the exception that where there are no partnership assets, and there is no living solvent partner, partnership creditors may prove with the separate creditors of a partner in the settlement of his estate *pari passu*.

2. Partnership creditors have no lien, strictly so called, on partnership assets, but must work out their preference over the creditors of the individual members of the partnership through the equities of such members.

3. If one of a partnership sells out, *bona fide*, his interest to his copartner or to another, without in any way retaining his equity to have the partnership creditors paid out of the assets, the property is converted into the individual property of the purchaser, free from all the equities of the seller, even if the purchaser, as the consideration for such purchase, agrees to pay the firm debts; otherwise, if the purchaser agrees expressly or impliedly to apply the assets to such purpose.

4. The word "assets", used in No. 1, is not confined to

assets at law, but includes all asssets applicable to the payment of the partnership debts, under the well-defined principles for the administration of the affairs of insolvent partnerships under the direction of a court of equity.

5. Those who deal with persons representing themselves to creditors generally as partners in a certain business are entitled to have the property used in such business applied to the payment of the debts incurred in such business in preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied.

6. If a member of an insolvent firm sells out with the understanding that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts and to wind up the old partnership concern by the payment of the debts of such concern out of the partnership assets and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues.

7. If one of the members of an insolvent firm sells out his interest to an outside party or to his associates, and thereby a new firm is formed, which assumes the debts of the old firm, the intention of all the parties being that the new firm shall continue the business in substantially the same way with substantially the same assets and that the old debts shall be paid out of such business, and such new firm subsequently makes an assignment for the benefit of creditors, in the administration of the assignment the creditors of the old and the new firm may prove their claims *pari passu* and be preferred over individual creditors of the members of such new firm.

By the Court.—The orders appealed from are affirmed, and the causes remanded for further proceedings according to law.

NEWMAN, J. [Dissenting opinion in the case of *Thayer* v. *Humphrey*].[2] The rule is fully settled, in the administration of the estates of insolvents, that the partnership debts are primarily payable out of the partnership assets and are entitled to a preference over the individual debts of the insolvent; and so, in the reverse case, the individual debts are primarily payable out of the individual assets of the insolvent and possess a like preference. The surplus only, after satisfying such priorities, can be reached by the other class of debts. For this purpose the joint estate and the separate estate of the insolvent constitute separate funds, to be administered separately. Story, Partn. (7th ed.), Sec. 376; 17 Am. & Eng. Ency. of Law, 1202, and cases cited in note 1; Parsons Partn. (4th ed.), Sec. 382; note to *McCulloh* v. *Dashiell's Adm'r*, 18 Am. Dec. 271; *Murrill* v. *Neill*, 8 How. 414; *Curtis* v. *Woodward*, 58 Wis. 499.

There are certain exceptions to this rule, which go to prove and ascertain it. One such exception, which is as well settled as the rule itself, is the case where there are no partnership assets to be administered and no living solvent partner. Where there are no partnership assets to be administered and no living solvent partner, then the joint creditor is entitled to share *pari passu* with the individual creditors of the separate estate. Story, Partn. (7th ed.), Sec. 378; 17 Am. & Eng. Ency. of Law, 1205, and cases cited in note 4; *Curtis* v. *Woodward*, 58 Wis. 499; Parsons, Partn. (4th ed.), Sec. 384, note 1.

In the instant case there was, in fact, no partnership. There are no partnership assets. There is no living solvent partner. The case seems to come clearly within the exception to the rule as above stated. There was no partner-

[2] A part only of this opinion is reprinted.

ship. The trial court so decided, and that is conclusive here. The fact that there was no partnership is absolute proof that there are no partnership assets. It is undisputed that J. D. Putnam, Alfred J. Goss and James B. Goss, all the debtors involved in the controversy, are all and each insolvent.

J. D. Putnam conveyed all his interest in the partnership property of J. D. Putnam & Co., in November, 1891, to Alfred J. Goss. Alfred J. Goss conveyed the entire property to James B. Goss. James B. Goss assigned the entire property for the benefit of his creditors. Alfred J. Goss has assigned all his property for the benefit of his creditors. There is absolutely no property in existence which any one claims to be partnership assets of James B. Goss and Alfred J. Goss. To require the petitioner to pursue for her remedy any such supposititious partnership assets is to mock her with the delusive promise of a remedy which must inevitably disappoint the expectation which it fosters.

The circumstance that the property which James B. Goss assigned for the benefit of his creditors is, in part, the same property which was once the firm property of J. D. Putnam & Co., is of no significance. No equity of the creditors of J. D. Putnam & Co. followed this property into the hands of James B. Goss. There is no hint of bad faith in the transfer, or that it was made in contemplation of insolvency. The rights of creditors in the assets of a partnership must be worked out through the equities of the partners. If the partner has no right, the creditor has none. The right of the partners is, in effect, a right to share in the surplus left after discharging all the firm debts. Each partner has the right to require all the firm assets to be applied to the payment of the firm debts; for so, only, can his liability *in solido* for them be diminished. But this right of a partner is property which can be sold and transferred. It is effectually sold and transferred by a sale and transfer, in good faith, of all his interest in the firm property, whether

to his partner or to a stranger. Such a sale and transfer dissolves the partnership and extinguishes every right which the retiring partner had in the firm property, including the right to require it to be applied to the payment of firm debts, unless such right is preserved by the terms of the sale. Story, Partn. (7th ed.), Secs. 307, 358, 360; Bates, Partn. Secs. 528, 540, 550-552; Parsons, Partn. (4th ed.), Secs. 178, 246, 248, 394, note 1 on page 330, and cases cited; Collyer, Partn. (Perkins' ed.), Secs. 894, 904, 905; Lindley, Partn. (Am. ed., with Audenreid's notes, 1888), 407, 765; 35 Cent. Law J. 418, and cases cited in note 3 on page 421; 17 Am. & Eng. Ency. of Law, 970-975, and cases cited in note 3; *Case* v. *Beauregard,* 99 U. S. 119; *Fitzpatrick* v. *Flannagan,* 106 U. S. 648; *Huiskamp* v. *Moline W. Co.* 121 U. S. 310, 323; *Baker's Appeal,* 21 Pa. St. 76; *Ladd* v. *Griswold,* 9 Ill. 25; *In re Lloyd,* 22 Fed. Rep. 88; *Saunders* v. *Reilly,* 105 N. Y. 12; *Davis* v. *D. & H. C. Co.* 109 N. Y. 47; *Robb* v. *Mudge,* 14 Gray, 534. The effect is the same where the remaining partner or other purchaser assumes the debts of the firm. This is a personal contract only, and leaves the retiring partner in the condition of an unsecured creditor. Bates, Partn. Sec. 528; Story, Partn. (7th ed.), 559; 17 Am. & Eng. Ency. of Law, 975; *Robb* v. *Mudge,* 14 Gray, 534. Such sales of a partner's interest in firm property are presumed to be valid. *Kimball* v. *Thompson,* 13 Met. 283. The authorities are nearly uniform. Only a few cases are out of line.

These considerations seem to show sufficiently that there are no joint assets of Alfred J. Goss and James B. Goss, and so that the petitioner has the right to go against the individual assets of either in the hands of their respective assignees. The case properly ends here.

Newman, J.: [Dissenting opinion in the case of *Davies* v. *Humphrey*].[3] This case arises out of the same failures and assignments as *Thayer* v. *Humphrey,* but in

[3] A part only of this opinion is reprinted. Pinney, J., also dissented in both cases, concurring in both opinions of Newman, J.

some of its circumstances differs from that case. The appellant was also a creditor of J. D. Putnam & Co., but he did not accept of J. B. Goss & Co. as a substitute for his original debtor. So he is not a creditor of either James B. Goss or J. B. Goss & Co.; and neither are in any way liable for his claim. The appellant seeks to prove his claim against the estate of Alfred J. Goss in the hands of the assignee for the benefit of his creditors. It is answered to his application: "Your remedy is against the assets of James B. Goss, which are in the hands of his assignee for the benefit of his creditors." And so he is turned away. It is not claimed that there are any firm assets of J. D. Putnam & Co. in existence, nor that either partner is solvent, nor that the transfer to J. B. Goss & Co. did not pass the legal title to all the assets of J. D. Putnam & Co. to J. B. Goss & Co. But it is held that the right of the partners to have these assets applied first to the payment of the debts of the firm was reserved by the terms and conditions of the transfer. This is believed to be without a shadow of foundation in fact. It is put upon the ground that the transaction was for the purpose of applying the assets of the firm to the payment of its debts; and this in the teeth of all the evidence. The firm of J. D. Putnam & Co. was composed of J. D. Putnam and Alfred J. Goss. Both partners signed and published a notice of the dissolution of the firm, in which the public was notified that the same business would be continued by J. B. Goss & Co., who assumed all the debts of the firm; and the same business was in fact carried on at the same place by J. B. Goss & Co. for two years and upward. It does not seem necessary to say that the intent to have the business carried on with the same property is incompatible with the purpose to have the property applied to the payment of the debts. The greater part of the property received by J. B. Goss & Co. was the gristmill itself. J. B. Goss & Co. got nothing of value for the promise to pay the debts of the old firm, unless they got the right to carry on the business with the property received from the old firm. The

real intention of the transaction is obvious. It was to make a novation of the debts of the old firm,—to substitute a new debtor in place of the old one. This was not altogether effected, because some of the old creditors did not consent to the substitution. If the purpose was to apply the firm property to the payment of firm debts, the obvious way to make the purpose effectual was to make an assignment of it for the benefit of the firm's creditors. It seems that this, clearly was the ordinary case of a transfer of the firm's assets for the purpose of a novation. In such a case all are agreed that the partners of the old firm lose their equity to have the assets transferred applied to the payment of the firm debts.[4]

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[4] *York County Bank's Appeal*, 32 Pa. 446, 1859. (A and B entered into an agreement which declared that they had formed a partnership in the livery business; that A was to contribute all the capital and have exclusive ownership of the same until B had contributed certain sums, the profits to be shared equally. An execution was issued against A and levied on the stock. Afterwards an execution was issued against the firm and also levied on the stock. B had not made the contributions which under the contract gave him an interest in the stock. *Held*, that the separate execution creditor was entitled to the proceeds of the sale.)

Bixler v. *Kresge*, 169 Pa. 405, 1895. (A employed B in his business, B permitting A to hold him, B, out as a partner. *Held*, that the creditors of the business had no priority over the other creditors of A.)

SECTION 2.—CORPORATION CASES.

WILLIAMSON *v.* SMOOT.

IN THE SUPREME COURT OF LOUISIANA, 1819.

7 Martin's Reports, 31.

APPEAL from the court of the first district.

MATHEWS, J., delivered the opinion of the court. The plaintiffs having caused an attachment to be levied on the steam boat Alabama, the St. Stephens steam boat company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot the defendant owns ten of them, subscribed for by him.

The questions to be decided are 1. Is it proper for our courts of justice to recognise, in their judicial proceedings, the company as a corporate body? 2. Can the shares or stock of any individual stockholder be legally attached?[1]

II. The existence of the claimants being recognised as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and disinct individual property in it, as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them. *Civ. Code,* 88, art. 11.

The court is of opinion that the district court erred in disallowing the claim of the company.

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[1] Only that part of the opinion which relates to the second question is reprinted.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steam boat the Alabama, and that she be released therefrom.[2]

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[2] In our principal case the creditor of the shareholder attempted to levy on his debtor's interest in the tangible property of the corporation. In the absence of statute had he attempted to levy on the shares of stock held by his debtor he would not have been any more successful. In explanation it is sometimes said that a share of stock is nothing more than a chose in action against the corporation, and that at the common law a chose in action is not subject to levy and sale. It is perhaps more correct to say that tangible property was the only property subject to legal execution and that whatever the real nature of the stockholders' interest, a share of stock was an "intangible entity," and therefore "incapable of caption by the gross methods of the common law." *Compare* opinion of Graves, J., in *Van Norman* v. *Jackson Circuit Judge*, 45 Mich. 204 (1881), p. 208.

By statutes passed in the different States a debtor's legal and sometimes his equitable interest in stock is made subject to legal execution.

BUNDY *v.* IRON CO.

In the Supreme Court of Ohio, 1882.

38 Ohio State Reports, 300.

Bundy, a stockholder in a manufacturing corporation, indorsed notes of the company in consideration that the payment of the notes should be secured and the indorser protected by mortgage on the property of the company. Through mistake the mortgage was made by the stockholders in their own names instead of in the name of the corporation. A subsequent mortgage was made in the name of the corporation to its creditors, and recorded, which, by its terms, was subject to the first.

This was an action by Bundy to foreclose his mortgage.[1]

White, J.: The controversy in this case is between Bundy, claiming as first mortgagee, subsequent judgment creditors, and creditors claiming under the second mortgage.

Two questions arise for consideration: (1) Whether the execution and record of the mortgage of December 5, 1874, to Bundy give him priority? and, (2) If not, does the recognition of the first mortgage in the second, of April 17, 1875, have that effect?

As to the first question: The consideration upon which Bundy indorsed the notes as surety of the corporation, was that the latter should give him a mortgage upon its property, conditioned that it would pay the notes at maturity, and save him harmless on account of his indorsements. The execution by the stockholders of the first mortgage was the attempted fulfillment of the agreement on the part of the corporation.

The Ophir Iron Company was incorporated under the act of April 12, 1858, providing for the creation and regulation of manufacturing companies. S. & C. 301, 304. Under

[1] The facts are restated and the Reporter's notes of the arguments of counsel omitted.

that act the directors of the company are required to be stockholders; and while it is declared "the directors shall have the general management of the affairs of the company," yet they are made "subject always to the control of the stockholders" in reference to such management.

The mortgage to Bundy now in question, not being made in the name of the corporation, cannot, as against it, be regarded as a legal mortgage; but it is a good, equitable mortgage against the corporation. And if such direction were necessary, it might be considered as equivalent to a direction by the stockholders to the proper officers to make a mortgage in the name of the corporation to Bundy. But such direction was not necessary from the stockholders. The directors, under the agreement by which they obtained Bundy's indorsements of the notes of the corporation, were bound to secure him by the mortgage of the corporation. This they failed to do, by sheer mistake, in the form of executing the mortgage, which it was competent for a court of equity to correct; and which it was their duty to correct without the action of the court. *Clayton* v. *Freet,* 10 Ohio St. 544.

If it were not for our statute on the subject of mortgages, this equitable mortgage would prevail over all lienholders and other claimants, except bona fide purchasers, for value. But it has been held, in a long series of decisions, that a mortgage has no effect, under the statute, either in law or equity, as against subsequently acquired liens, until its execution according to the statute, and its delivery to the recorder of the proper county for record. *Strang* v. *Beach,* 11 Ohio St. 283; *Bercaw* v. *Cockerill,* 20 Id. 163.

But such execution and delivery for record are not required as between the original parties or their heirs. *Bloom* v. *Noggle,* 4 Ohio St. 45; *Sidle* v. *Maxwell,* Id. 236.

The second question is: Does the recognition of the first mortgage in the second have the effect to give it priority?

We think this question must be answered in the affirmative. The second mortgage was executed in due form by

the corporation, and was made expressly subject to the mortgage to Bundy. Hence, all subsequently acquired liens that are subject to the second mortgage are necessarily also-subject to the first. *Coe* v. *Railroad Co.*, 10 Ohio St. 374; *Bercaw* v. *Cockerill*, 20 Id. 166.[2]

Judgment accordingly.[3]

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[2] The rest of the opinion on the second question is omitted.

[3] *Compare: England* v. *Dearborn*, 141 Mass. 590, 1886. (Tort for the conversion of certain property to which A, the plaintiff, claimed title as mortgagee. A proved that B was president, treasurer, general manager and owner of all but two shares of the C Company; that he, A, had endorsed certain notes for the Company, and that to indemnify him, A, B had delivered to him an instrument which purported to be a mortgage by the C Company of all its property except its book accounts. The instrument was signed by B as president. *Held*, that A's suit should be dismissed, as he failed to prove that the C Company authorized B to make the mortgage; that the facts did not warrant the inference that B had any implied authority to mortgage the property, and that the Company had received no benefit from the mortgage.)

BUTTON *v.* HOFFMAN.

In the Supreme Court of Wisconsin, 1884.

61 *Wisconsin Reports*, 20.

Orton, J.: This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the circuit court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and became the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for cor-

porate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. *Ang. & A. on Corp.* secs. 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Id. sec. 557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestui-que-trusts*. *Gray* v. *Portland Bank*, 3 Mass. 365; *Eidman* v. *Bowman*, 4 Am. Corp. Cas. 350. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. *Ang. & A. on Corp.* sec. 191; *Pope* v. *Brandon*, 2 Stewart (Ala.), 401; *Whitwell* v. *Warner*, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. *Bradley* v. *Holdsworth*, 3 Mees. & W. 422; *Waltham Bank* v. *Waltham*, 10 Met. 334; *Tippets* v. *Walker*, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. *Ang. & A. on Corp.* secs. 160, 190, 557; *Hyatt* v. *Allen*, 4 Am. Corp. Cas. 624. A conveyance of all

the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. *Wilde* v. *Jenkins,* 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the *sole* stockholder. *Ang. & A. on Corp.* sec. 779*a*.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at the same time, it would belong to the corporation. *One* stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do. It is said in *Utica* v. *Churchill,* 33 N. Y. 161, "the interest of a stockholder is of a *collateral* nature, and is not the interest of an *owner;*" and in *Hyatt* v. *Allen, supra,* that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In *Winona & St. P. R. R. Co.* v. *St. P. & S. C. R. R. Co.* 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property, and immunities. In *Baldwin* v. *Canfield,* 26 Minn. 43, it was held that the

sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett* v. *Brickett,* 14 Allen, 62, an action of replevin was brought by A., B., and C., as the "Trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B., and C., trustees as aforesaid," became bound, and the officer, in his return, certified that he had taken a bond "from the within-named A., B., and C.," and the property was receipted by "A., B., & C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in *Van Allen* v. *Assessors,* 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In *Wilde* v. *Jenkins, supra,* where a copartnership bought all the property and effects, together with the franchises, of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles* v. *R. C. Bank,* 11 Paige, 118, it was held that, although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not be until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett* v. *Am. Art Union,* 5 Sandf. Super. Ct. 614, it was held that, "as a general rule, the whole title, legal and equitable [to its property], is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant, as a shareholder in the Art Union, for an injunction against a certain disposition of its property, was denied, because he had no interest in it. See, also, *Goodwin* v. *Hardy,* 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently anal-

ogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. *Timp* v. *Dockham*, 32 Wis. 146; *Sensenbrenner* v. *Mathews*, 48 Wis. 250. In analogy to the above principle it was held in *Murphy* v. *Hanrahan*, 50 Wis. 485, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

PARKER *v.* BETHEL HOTEL CO.

IN THE SUPREME COURT OF TENNESSEE, 1895.

96 Tennessee Reports, 252.

Lucius Frierson owned a large number of the shares of the Bethel Hotel Co., a corporation. These in large part he assigned to various persons as collateral security for the payment of his notes. The company sold that part of its property in which it had conducted a hotel. Frierson purchased all the remaining stock of the company, and thereafter managed the property in his own name. He then assigned by deed in his own name all the property of the company to one Webster, in trust, to sell the same, for the benefit of certain of his creditors, the creditors who held as collateral, the stock of the company not being included. These secured creditors brought this bill against the Bethel Hotel Company and Webster, praying that the property of the company should be sold for the benefit of the holders of the stock, and that Webster be restrained from proceeding under his deed. A decree in accordance with this prayer being granted, and the decree being affirmed by the Court of Chancery Appeals, an appeal was taken to the Supreme Court.[1]

J. C. BRADFORD, SP. J.: Admitting it to be true, as claimed, that Frierson was the owner of all the stock of the corporation, it by no means follows that the corporation was thereby dissolved and forfeited its franchises. On this question the latest text writer on corporation law has this to say: "Contrary to early opinion, it is now generally held that the fact that all the shares in a joint stock company have passed into the hands of two members, or even into the hands of a single person, does not, *ipso facto*, work a dissolution of the corporation, since such sole owner may so dispose of the shares, as, by

[1] The facts are restated and only a portion of the opinion is printed.

the election of the necessary directors and officers, to continue the corporate existence." 5 Thompson's Commentaries on the Law of Corporations, Sec. 6653. And, in 2 Morawetz on Corporations, Sec. 1009, it is said: "It is well settled that all the shares of a corporation may be held by a single person, and yet the corporation continue to exist, and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." It has been held that a corporation which has sold all its assets, with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a single person, was, nevertheless, not dissolved, and that its existence could be terminated only by judgment of forfeiture or by surrender accepted by the State. *Russell* v. *McLellan,* 14 Pick. (Mass.), 69, 70; *Newton Mfg. Co.* v. *White,* 42 Ga., 148; *Baldwin* v. *Canfield,* 26 Minn., 43.

The dissolution of a business corporation is effected in one of the following ways: (1) by the expiration of its charter; (2) by Act of the Legislature, where power is reserved for that purpose, or there is no constitutional inhibition; (3) by surrender of charter which is accepted; (4) by forfeiture of the franchises and judgment of dissolution, pronounced by a Court having jurisdiction. 2 Morawetz, Sec. 1004; Taylor on Private Corporations, Sec. 430. It is not pretended that the Bethel Hotel Company was dissolved in either of the ways indicated. The charter of the corporation has not expired, neither has it been repealed by the Legislature, or been surrendered to the State by its members or stockholders. It may be true that there was a non-user of its franchises by the corporation for a period of seven years or more, occasioned by the sale of the only property it owned which could have been used for hotel purposes. Undoubtedly, the non-user of its franchises by a corporation is ground for dissolution and forfeiture of its charter, at the instance of the State; but until sentence

of dissolution has been pronounced by a Court of competent jurisdiction, in a proper proceeding instituted for the purpose, the corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose, by the State granting it. Code (M. & V.), Sec. 1712; *State* v. *Butler*, 15 Lea, 104, 110; *Jersey City Gaslight Co.* v. *Consumers' Gas Co.*, 40 N. J. Eq., 427; *Broadwell* v. *Merritt*, 87 Mo., 95. Until dissolution has been thus judicially pronounced, neither the existence of the corporation or its title to its property can be questioned collaterally.

We are bound to conclude, therefore, that the Bethel Hotel Company was not dissolved, or its franchises extinguished, for any of the reasons alleged by the defendants, and that it is now a corporation endued with life, with authority to own property and exercise all the powers conferred on it by its charter.

Defendants insist that the alleged equitable estate of Lucius Frierson in the property of the Bethel Hotel Company, did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is, that if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or, at least, may sell and dispose of it by deed, if he choose to do so. This proposition is argued by counsel for defendant with force and ability, and is supported by some authority. It has found favor with the Supreme Court of Maryland (*Swift* v. *Smith*, 65 Md., 428, 433); but the decision of that learned Court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental.

A corporation and its shareholders are distinct legal entities. In *Keith* v. *Clark*, 4 Lea, 718, this Court held that, notwithstanding the State owned all the stock in the Bank of Tennessee, "the bank and the State are entirely

different legal entities;" and in *Lillard* v. *Porter*, 2 Head, 176, it was said, "stockholders are totally distinct from the corporation." Important consequences result from this rule. The shareholders are neither responsible for the debts nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.

"Shareholders," says Thompson, "are not joint tenants or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation." Commentaries on the Law of Corporations, Sec. 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed.

In *Wheelock* v. *Moulton*, 15 Vt., 519, Redfield, J., stated the reasons for the rule in his usual clear and accurate style. In that case, Moulton and Hutchinson, sole proprietors and owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repayment of money borrowed of the plaintiff, Wheelock. He brought suit to enforce his mortgage. Judge Redfield said: "The fact that the signers of this deed owned the whole of the shares will make no difference in regard to the necessity of a vote of the corporation, in order to convey the land. The title to the land was in the corporation, not in the individual shareholders. The deed of one, or of any number of the stockholders, will not affect the title to the land. The share owners are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the

shares might control the corporation, and so he could if he owned a majority of the shares; but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation."

And in *Humphreys* v. *McKissick,* 140 U. S., 304, Mr. Justice Field, discussing the same question, said: "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it, and the corporation acts only through its officers, subject to the conditions prescribed by law."

A very instructive case on this question is *Baldwin* v. *Canfield,* 26 Minn., 43. The facts of that case were very similar to those of this case, and the direct question now under consideration was passed upon. The opinion of the Court was in accord with the cases above cited. See also *Button* v. *Hoffman,* 61 Wis:, 20.

We are thus led, both by reason and authority, to the conclusion that Lucius Frierson, as sole stockholder of the Bethel Hotel Company, had no title, legal or equitable, to its property. The title to the property was in the Bethel Hotel Company, and could only be conveyed by it. The conveyance of its real estate is one of the most solemn acts of a corporation, and it can only be done in pursuance of a vote of the corporation, and by deed executed in the form and mode prescribed by law. Thompson's Commentaries on the Law of Corporations, Sec. 5096. At common law a corporation could not execute a deed to realty except under seal; and the general corporations Act of 1875, under which the Bethel Hotel Company was organized, provides that, if the corporation have no seal, it shall be bound by the signature of its name by a duly authorized officer.

To have made a valid conveyance of the real estate of the company, it was necessary, therefore, that the deed should have been executed in the name of the corporation, under seal, if it had one, and, if not, its name should have been signed by an agent duly authorized by its governing

agency, its board of directors. *Garrett* v. *Belmont Land Co.*, 94 Tenn., 460. As we have seen, nothing of this kind was done. The deed to defendant, Webster, was executed by Lucius Frierson, in his own name, and under his own signature. The Bethel Hotel Company, although it owned the property, was in no sense a party to it. For this and other reasons given, the deed of Lucius Frierson, conveying the real estate of the Bethel Hotel Company to defendant, W. J. Webster, was void, and conveyed to him no title or interest therein.[2]

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[2] In the court below, the Chancellor had decreed the dissolution of the company. One of the conclusions reached on this appeal being that, "He had no power in this case to decree a dissolution," as that "could be done only by a suit instituted by the State for the purpose," the cause was remanded for further proceedings.

Compare: Humphreys v. *McKissock,* 140 U. S. 304, 1891. (Several railroads combined to construct an elevator, to be connected with their respective roads. A corporation was organized to erect the elevator. Each railroad received a certificate of stock corresponding to its subscription towards the cost. One of the railroads mortgaged "all its property, rights, franchises, real estate, tracks, depots and appurtenances belonging thereto." *Held,* that the only interest of the railroad company in the elevator was as a stockholder in the elevator company and that the mortgage did not cover this interest.)

Sellers v. *Greer,* 172 Ill. 549, 1898. (All the shares of the B Company were divided between A and C, except that a son of A owned one share and the son of C another. A and C made a contract in which A agreed to convey to C certain property of the company and C agreed to convey the shares owned by him to A. C brought a bill against A, praying that A might be decreed to convey the property in accordance with the contract. *Held,* that A had no title to the property of the company and that any decree that could be made would be nugatory.)

Merchants' Ad-Sign Co. v. *Sterling,* 124 Cal. 429, 1899. (The Code made every contract by which any one was restrained from carrying on any kind of business void, except that one who sold a business might agree with the buyer to refrain from carrying on a similar business. B was a stockholder and general manager of the C Company, a corporation engaged in the advertising business. B transferred what he asserted was all his stock and also his interest in the good-will of the business of C to A, and agreed for a valuable consideration that he would not engage in the advertising business in competition with the C Company so long as A or any one deriving title to the good-will of the business of the C Company from A should carry on a like business. A brought a bill asserting that B was engaging in the advertising business in violation of this contract, and asking for an injunction. Demurrer sustained on the ground that a stockholder had no interest in the good-will of the business carried on by the corporation which he could transfer.)

Home Fire Insurance Co. v. *Barber,* 93 N. W. 1024, Neb. 1903. ("Cases of this kind must be differentiated sharply from those where the proceeding is at law, or where a question of title to the corporate property is involved. There is no question that stockholders, as such, have no title to the corporate property which they can convey or encumber in their own names. But this, in substance, is only another way of saying that the corporation must act through its proper agents and in the prescribed way." Per Pound, C., p. 1033.)

CHAPTER XI.

ALIENATION OF THE SEPARATE PROPERTY OF A PARTNER FOR A PARTNERSHIP DEBT.

NEWMAN *v.* BAGLEY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1835.

33 Massachusetts Reports, 570.

ASSUMPSIT: The writ was dated January 27, 1834. By the answer of the trustee it appeared, that at the time of the service of the writ, he was indebted to the defendant in the sum of $25; that on January 10, 1834, the defendant and Levi Vosburgh, of Hillsdale in New York, as members of the late firm of Bagley and Vosburgh, and the defendant, in his individual capacity, and also as member of the late firm of Hinman & Bagley, assigned to Nicholas Hollenbeck and Lewis Haywood, who were likewise inhabitants of Hillsdale, all the books of account, notes, obligations and evidences of debt, belonging to the defendant or either of the two firms, with full power to collect the debts and demands, in trust to apply the proceeds thereof, proportionably to the indemnification of the assignees and certain other persons named, who had become indorsers or sureties for the defendant and the two firms; and that on June 14, 1834, notice of such assignment was given to the trustee.

Wilde, J., afterward delivered the opinion of the court. The trustee in his answer admits that he was indebted to the principal, but he discloses an assignment of this, and other debts and property, from Bagley to Nicholas Hollen-

beck and Lewis Haywood, made before the service of the plaintiff's writ; and the question is, whether this assignment is valid, so as to defeat the plaintiff's attachment in this process. It has been argued, that the assignment is good by the law of New York, however it may be considered here, and that an assignment by a foreign debtor, which is good by the law where he has his domicil, is valid and will be supported here. This seems to be the established rule; but we consider this assignment valid by our laws, as well as by the laws of New York; so that this point becomes immaterial. * * *.[1]

But it is objected, that a partner cannot assign his separate property to pay partnership debts, so as to avail against the separate creditors of the assignor. This objection, however, does not appear to be well founded. It is true, that the creditors of an individual partner cannot attach partnership property to the prejudice of partnership creditors; because a partner has no distinct and separate property in the funds of the partnership, until the debts of the partners are paid; but this reason fails in regard to an assignment by a partner of his separate property. That is equally liable to attachment by his own creditors, or the creditors of the firm, and an assignment to pay either is good.

Trustee discharged.[2]

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[1] The Court's discussion of this question is omitted.

[2] *Compare: Stewart* v. *Slater,* 6 Duer, 83, 1856. (A and B were partners. A gave a mortgage on certain of his personal property to C to secure a debt due C by the firm. A, subsequently, gave D a mortgage on the same property to secure an individual debt due D. D, on a complaint to foreclose his, D's, mortgage, claimed that his mortgage was prior to C's mortgage. Claim denied. Duer, J.: "As each partner in a firm is personally liable for the payment of its debts, there is certainly no law that forbids him from paying, or securing the payment of the whole, or of any portion of them, from his own separate property or funds; and in many cases to make such payment, or give such security, may not only be his right, but as between him and his partners a positive duty; the debt or fund or money, may, in respect to the creditor, be a partnership debt, and yet may be one which, in respect to his partners, he is bound to discharge; and, assuredly, it has never been supposed that the creditor to whom the payment is made or security given, is bound to inquire into the accounts of the firm, or that his right to accept such payment, or security, is at all affected by the insolvency of the partner from whom he receives it.")

Holton v. *Holton,* 40 N. H. 77, 1860. (A and B were partners. A

was indebted to E. C was indebted to A. A and B were indebted to D. A directed C to pay the money due him, A, to D, and C agreed to do so. E secured a judgment against A and attached the debt due by C. *Held,* that C must pay his, C's, debt to E. Fowler, J.: "It may be considered as the well established rule of law in this State, that the separate creditor of a partner have a preference over the separate estate of their debtor, for the satisfaction of their debts, until it shall have been actually and legally appropriated and applied in payment of partnership debts; and that any attempt, by sale or otherwise, with notice, to divert the separate property or funds of the individual debtor from the payment of his separate debts, to the discharge of a partnership liability of the firm of which he may be a member, is in principle a fraud on the rights of a creditor of the individual debtor, and void as to him."

MEECH *v.* ALLEN.

In the Court of Appeals, New York, 1858.

17 New York Reports, 300.

Appeal from the Supreme Court. The complaint averred these facts: In May, 1847, the plaintiffs recovered a judgment against one Taylor, upon his sole and individual indebtedness, for $8,650.65, which was duly docketed and became a lien upon his real estate. In 1848, Taylor died, seized of real estate in his own individual right, upon which said judgment was a lien. Taylor and one Hiram Pratt, who died in May, 1840, were, in their lifetime, partners in the business of common carriers upon the Erie canal and the great lakes. A demand arose against them as such partners which was in litigation when Pratt died, and upon which a judgment was recovered in the Supreme Court, and duly docketed, on the 13th May, 1842, against Taylor, as survivor of himself and Pratt, for $9,990.05; which judgment was assigned to and became the property of the defendant Allen after the death of Taylor and the recovery of the plaintiffs' judgment. In April, 1850, executions were issued upon both of the above described judgments to the sheriff of Erie, who, in virtue thereof, on the 4th of June, 1850, sold certain parcels of the real estate in the city of Buffalo whereof Taylor died seized in his own right.

The plaintiffs attended at the sale, and gave notice to the defendant of the facts stated, claiming that their judgment was entitled to priority, and that the money raised by the sale should be applied first to its satisfaction. The defendant became the purchaser at the sale. There is no other individual property of Taylor out of which the plaintiffs can obtain satisfaction of their judgment except the land thus sold, and there is sufficient estate of Hiram Pratt, deceased, to satisfy the judgment of the defendant.

The complaint prayed that the land might be resold and the proceeds first applied to the payment of the plaintiffs' judgment, or that the defendant pay to them so much of the proceeds of the sale, already had, as would extinguish their judgment, with the costs of this action. The defendant demurred, and had judgment in his favor, which was on appeal, affirmed by the Supreme Court, at general term in the eighth district; whereupon the plaintiffs appealed to this court.

SELDEN, J.: It is a settled rule of equity that, as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts; and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class until all the claims of the latter are satisfied. This, however, is a rule which prevails in courts of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases, the rule is *equitas sequitur legem.* (1 Story Eq. Jur., section 553).

In *Wilder* v. *Keeler* (3 Paige, 171), Chancellor Walworth says: "Equitable rules are adopted by this court in the administration of legal assets, *except so far* as the law has given an absolute preference to one class of creditors over another." So, in the case of *Averill* v. *Loucks* (6 Barb. S. C. R., 470), Paige, P. J., says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce *all antecedent liens,* claims and charges existing upon the property, according to their priorities." This is also conceded in the case of *McCulloh* v. *Dashiell* (1 Har. & Gil., 96), where the whole doctrine of the distribution in equity of the joint and separate property of partners is very elaborately examined.

Archer, J., by whom the opinion of the Court was delivered, there says: "At law, the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered joint and several, *without the possibility of the interposition of any restraining power of a Court of equity.*" But especially must it be beyond the power of such courts to interfere where an absolute right of legal priority is given by force of a positive statute, as in case of a judgment. Chancellor Walworth, in *Mower* v. *Kip* (6 Paige 88), says: "The rule of this court is to give effect to the lien of a judgment upon a legal title, so far as it can be enforced by execution at law."

As there is no doubt that at law the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if such judgment were for the separate debt of such partner it is obvious from the preceding authorities, that the theory upon which the complaint in this case was drawn is erroneous. The principle that the separate property of an individual partner is to be first applied to the payment of his separate debts, has, as we have seen, never been held to give priority as to such property to a subsequent judgment for an individual over a prior judgment for a partnership debt. It is true, that courts of equity will sometimes give to a mere equitable lien, which is prior in point of time, a preference over a subsequent judgment; but this will be done only where such prior lien is specific in its character, as in the case of *White* v. *Carpenter* (2 Paige, 219). The mere general equity of the separate creditors to have their debts first paid out of the individual property of the partners does not amount to a lien at all, much less a lien of the kind necessary to give it a preference over a judgment for a partnership debt.

The plaintiffs cannot under the averments in the complaint avail themselves of that principle of equity which en-

ables a creditor having a lien upon one fund only, to compel a creditor who has a lien not merely on the same fund, but also upon another, to resort first to the latter to the end that both may be paid. If the complaint had averred that there was sufficient partnership property upon which the defendant's judgment was a lien, to satisfy such judgment it is possible that under the principle referred to the plaintiffs might have been entitled to some relief; and in that event it would not have been a valid objection to the complaint that it did not ask for the relief appropriate to the case. But the averment in the complaint is simply that there is sufficient estate of the deceased partner, Hiram Pratt, to satisfy the defendant's judgment.

This averment brings the case directly within the doctrine laid down by Lord Eldon in *Ex Parte* Kendall (17 Vesey, 520). He says: "If A has a right to go upon two funds, and B upon one, having both *the same debtor*, A shall take payment from that fund to which he can resort exclusively, that by those means of distribution both may be paid. That takes place where both are creditors of *the same person*, and have demands against funds the property of the same person. But it was never said that if I have a demand against A & B, a creditor of B shall compel me to go against A without more, as if B himself could insist that A ought to pay in the first instance as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all obligations arising out of these complicated relations may be satisfied. But if I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if not founded in some equity giving to B the right for *his own sake* to compel me to seek payment from A."

The point has also been expressly decided in this State in the case of *Dorr* v. *Shaw* (4 John. Ch. R., 17). The only difference in principle between that case and this is that there it did not appear that the joint debtors were partners. This however is a difference which operates against the claim of the plaintiffs here. Where two individuals not partners are

jointly indebted it might seem to be just to presume that each owed one-half the debt, and to that extent therefore there might be an equity in favor of the one owing an individual debt to have so much of the joint debt paid by his co-debtor. But in regard to partners it is now well settled upon an analogous question, that no such presumption can be indulged. Formerly a judgment creditor of one of two partners might levy his execution upon property belonging to the firm, and, upon the presumption that the interests of the partners were equal, might proceed to sell and appropriate one-half the avails to the satisfaction of his debt. This however was long since over-ruled.

In the case of *Dutton* v. *Morrison* (17 Vesey, 193), Lord Eldon, in discussing this question, says: "It may be represented that the world cannot know what is the distinct interest of each (*i. e.,* each partner), and therefore it is better that the *apparent* interest of each should be considered as his actual interest. But courts of equity have long held otherwise." He then lays down the rule ever since acted upon, that the creditor in such a case must wait until the partnership accounts are settled before he can claim anything from the partnership property.

The principle here asserted by Lord Eldon is directly applicable to the present case. It is, that no inference can be safely drawn from the mere external relations of partners to the world as to the situation of their affairs *inter se,* and that in all judicial proceedings involving the latter an investigation is first to be made; and such is the variety and frequent complexity of partnership dealings that any other rule would obviously lead to gross injustice. It is impossible therefore in this case to assume, without any averments on the subject in the complaint that the estate of the deceased partner Pratt ought, in equity, to pay any portion of the defendant's judgment. Hence, upon the principles laid down by Lord Eldon, and universally acted upon by courts of equity, the complaint is clearly insufficient.

The judgment of the Supreme Court therefore should be affirmed with costs.

All the judges concurring,

Judgment affirmed.[1]

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[1] *Accord: Allen* v. *Wells,* 22 Pick. 450, 1838; *Cleghorn* v. *Insurance Bank,* 9 Ga. 319, 1851; *Baker* v. *Wimpee,* 19 Ga. 87, 1855; *Cummings's App.,* 25 Pa. 268, 1855; *Kuhne* v. *Law,* 14 Rich. 18, 1866; *Stevens* v. *Perry,* 113 Mass. 380, 1873. (A and B were partners. C was indebted to A. D, a firm creditor, secured a judgment and attached the debt due A. E, a separate judgment creditor of A's, subsequently attached the same debt. In an action at law, *Held,* that D's lien on C's obligation to pay A was superior to E's lien.)

Contra: Javis v. *Brooks,* 23 N. H. 136, 1851. (A and B were partners. As part of their separate property they held an undivided two-thirds interest as tenants in common in certain land. A firm creditor obtained a judgment and attached this interest. Subsequently a separate though joint creditor of A and B secured a judgment and attached the interest of A and B in the land. *Held,* that, as in New Hampshire under the decision of *Ferson* v. *Monroe,* 1 Foster's Rep. 462, the right of the firm creditors to priority on firm assets "has not been put on the ground of a lien among the partners, but is asserted as a legal right of the creditor," "principle, consistency and equal justice to the separate creditors" would seem to require that they should have priority on separate assets. *Accord: Crockett* v. *Crain,* 33 N. H. 542, 1856. Even in New Hampshire, however, when the partnership creditor has once appropriated the separate property of the partner to the payment of the partnership debt, the property is no longer subject to levy at the suit of the separate creditor. *Bower* v. *Smith,* 48 N. H. 111, 1868.)

WISHAM *v.* LIPPINCOTT.

IN THE COURT OF CHANCERY, NEW JERSEY, BEFORE CHANCELLOR WILLIAMSON, 1853.

9 New Jersey Equity, 353.

WILLIAM WISHAM was a member of a partnership. John Winship recovered a judgment against the firm, and caused a levy to be made on the separate real estate of Wisham. Jacob S. Kay, a separate creditor of Wisham, brought a bill in Chancery, alleging that the firm property, also levied on by Winship, was sufficient to satisfy his judgment. The prayer of the bill was that the sheriff be restrained from making a sale of the separate real estate of Wisham. On the filing of the bill, an injunction, in accordance with the prayer, was issued, the case was heard on a motion to dissolve this injunction.[1]

THE CHANCELLOR: As to the rights of the complainant, Kay, who is a separate creditor of Wisham. It is insisted, that he is entitled to be first paid out of the effects of his debtor, before the joint creditor of the firm can claim anything. This would seem to be in conformity to the principle stated in 1 Story, section 675, that "the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim any thing." But this principle cannot apply to creditors who have secured their debts by judgment and execution liens, and occupying the relative position of the parties in this suit. If so, it utterly annuls and destroys the principle before stated, that every partnership debt is joint and several. I doubt very much its correctness, as a general rule. A Court of Chancery may, undoubtedly, where the equities between the partners are to be adjusted, and where

[1] The facts are restated. Others, not separate creditors of Wisham, joined in the bill, but only that part of the opinion which relates to the claim of Kay being repri.. d, any statement of the facts on which the other plaintiffs based their contentions is unnecessary.

the assets are before the court, and the court called upon to marshal them, apply such a rule. Story, section 676, note 1, says, "If the true doctrine be, that a partnership contract is several, as well as joint, then there seems no ground to make any difference whatsoever in any case between joint and several creditors, as to payment out of joint or separate assets." He adds, "This is now the established doctrine." I have no hesitation in saying, that when a joint creditor of the firm has a judgment, and execution levied upon the separate effects of one of the partners, this court ought not, in mere compliance with any such rule, as that the separate creditors of each partner are entitled to be first paid out of the separate effects of one of their debtors before the partnership creditors can claim anything, interfere with such execution, either on the application of any one of the partners, or any creditor of the firm, or separate creditor of any of its members.

As I have remarked already, there is, in this case, something besides the application of such a rule, entitling the complainants to the interference of the court.

The motion to dissolve is denied.[2]

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[2] *Compare: Straus* v. *Kerngood,* 21 Grat. 584, 1871: ("K recovers a judgment against F & H as partners, and sues out an execution of *fi. fa.* upon it, which is returned 'no effects.' Afterwards S recovers a judgment against H for an individual debt of H. There are no assets of the partnership of F & H, but G is indebted to H. K summons G as garnishee and obtains a judgment for the amount of his debt against E. S also summons G and obtains a judgment; the summons of S being after that of K, but he obtains his judgment first. S then files his bill to enjoin K from receiving and G from paying to K the debt of E to H. *Held,* K having first recovered his judgment against F & H and sued out execution thereon, has the prior lien upon the debt due from E to H; and a court of equity cannot deprive him of it.")

Barrett v. *Furnish,* 21 Ore. 17, 1891. (A and B were partners. C, a firm creditor, secured a judgment and docketed a lien on the real property of A. The administrator of A brought a bill against C to restrain a sale under C's judgment, on the ground that A had many separate creditors; that his estate would be insufficient to meet such creditors unless C was restrained, and that B had real estate on which C might levy. C's demurrer sustained.)

In re SANDUSKY.

Register's Decision, 1878.

17 *National Bankruptcy Register*, 452.

Abraham Sandusky was a member of the firm of H. Sandford & Co. On August, 1876, certain firm creditors having secured a judgment levied on the individual property of Sandusky. In February, 1876, the firm became bankrupt. On a petition brought by the assignee in bankruptcy, a separate creditor of Sandusky, and Sandusky, an injunction was issued restraining the execution creditors from enforcing their lien.[1]

W. N. Branson, *Register in Bankruptcy.*

The petitioners seek to maintain their injunction upon the familiar rule obtaining in equity and in bankruptcy, that the separate estate of an individual partner cannot be applied towards payment of the partnership debts until after the payment in full of his separate debts. The respondents, on the other hand, contend that the above rule does not obtain in this case, for the reason that they had obtained a specific lien on the property in question, by virtue of the levy of an execution thereon.

I have hunted up and examined the authorities on the question thus presented, with such care as my time would permit. The only case in a court of the United States which I have found in point is the case *In re* Lewis (8 N. B. R., 546), decided by Judge Rives, of the U. S. District Court for Western District of Virginia, and affirmed on appeal by Judge Bond, of the Circuit Court. In that case the court holds that although, in the distribution of the general assets of a bankrupt, the partnership assets are to be first applied to the partnership debts, and the individual assets of any

[1] The facts are re-stated and that part of the Register's opinion in which he states the facts omitted.

separate partner first applied to his individual debts, according to the terms of the Bankrupt Law, yet, when a judgment has been obtained by a partnership creditor against the members of a concern, such judgment operates as a several lien against the real estate of each partner; and if prior in point of time to a judgment obtained against an individual partner by an individual creditor of such partner, is to be preferred to such subsequent judgment; but the court is further of the opinion that when such partnership creditor can get satisfaction of any part of said judgment out of the partnership assets, the *pro rata* distribution to which such partnership creditor is entitled out of the partnership fund shall first be applied as a credit on said judgment against the separate partner, in relief of the fund of such separate partner, for the benefit of the separate creditor.

In the case of *Meech* v. *Allen* (17 N. Y., 300), the New York Court of Appeals say this: It is a settled rule of equity that, as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts, and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class until all the claims of the latter are satisfied. This, however, is a rule which prevails in a court of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside, or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases, the rule is *equitas sequitur legem.* (1 Story Eq. Jur., Sec. 553.)

In *Wilder* v. *Keeler* (3 Paige, 167), Chancellor Walworth says: "Equitable rules are adopted by this court in the administration of legal assets, except so far as the law has given an absolute preference to one class of creditors over another." So in the case of *Averill* v. *Loucks* (6 Barb., 470), Paige, Justice, says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal

assets, and recognize and enforce all antecedent liens, claims and charges, existing upon the property, according to their priorities." This is also conceded in the case of *McCullough* v. *Dashiell* (1 Har. & Gil., 96), where the whole doctrine of distribution in equity of the joint and separate property of partners is very elaborately examined. Archer, J., says: "At law the joint creditors may pursue both the joint and separate estate to the extent of each for the satisfaction of their joint demands, which are at law considered joint and several without the possiblity of the interposition of any restraining power of a court of equity." But especially must it be beyond the power of such courts to interfere where an absolute right of legal priority is given by force of a positive statute, as in case of a judgment. Chancellor Walworth, in *Mower* v. *Kip* (6 Paige, 88), says: "The rule of this court is to give effect to the lien of a judgment upon a legal title so far as it can be enforced by execution at law."

I have thus quoted at large from the opinion of the N. Y. Court of Appeals, as it is a court of high authority. To the same effect is *Straus* v. *Kerngood* (21 Gratt., 584). In New Jersey it is held that the equitable principle above referred to cannot apply to creditors who have secured their debts by judgment and execution liens. 1 Stock, (N. J.), 836. The Supreme Court of Georgia hold that in cases of co-partnership, the equity in favor of separate creditors will not be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate. (*Baker* v. *Wimpee,* 19 Ga., 87; *Cleghorn* v. *Ins. Bank,* 9 Ga., 319.)

In the latter case, Lumpkin, J., delivering the opinion of the court, says: "The equity in favor of separate creditors will never be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate."

In *Wisham* v. *Lippincott* (1 Stock., 353), Chancellor Williamson says: "A Court of Chancery may undoubtedly, where the equities between the parties are to be adjusted

and when the assets are before the court, and the court is called upon to marshal them, apply such a rule. I have no hesitation in saying that when a joint creditor of a firm has a judgment and execution levied upon the separate effects of one of the partners, this court ought not, in mere compliance with any such rule as that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtors, before the partnership creditors can claim anything, to interfere with such execution, either on application of one of the partners or any creditor of the firm, or separate creditor of any of its members."

Some cases in New Hampshire would seem to announce the contrary principle, as *Crockett* v. *Crain* (33 N. H., 542); *Jarvis* v. *Brooks* (23 N. H. (Fest.), 136), and *Holton* v. *Holton* (40 N. H., 77). But these cases must be considered in connection with a late decision of the same court (*Bowker* v. *Smith,* 48 N. H., 111), which appears to modify the doctrine announced in the earlier cases. In the latter case, Chief Justice Perley, in giving the opinion of the court, and speaking of the equitable doctrine relied on by the petitioner in this case, says: "The grounds on which the doctrine was admitted here afforded no reason for supposing that this right remains to be asserted after the property, once taken for the satisfaction of debts, has been finally appropriated under legal process by levy on the property of the individual partner." The Supreme Court of South Carolina holds that the private creditors of a partner are entitled to pay out of his separate estate, in preference to partnership creditors, though the latter have recovered judgment against him as surviving partner. (*Woddrup* v. *Ward,* 3 Des., 203.)

Upon consideration of all the authorities upon this point, which I have been able to find, it appears to me that there is a very decided preponderance to the effect that where an execution lien has been obtained, in good faith, before bankruptcy, on the individual property of a member of a partnership firm, under a judgment against the firm, that that statutory lien will not yield to the equities of the sepa-

rate creditors of that partner. And this is entirely in harmony with the rule which obtains in Courts of Bankruptcy, that liens generally, including execution liens, which have been acquired in good faith before the commencement of proceedings in bankruptcy, are preserved and enforced.

I am therefore of opinion, upon the papers submitted to me in this matter, that the injunction should be dissolved. All of which is respectfully submitted.

TREAT, J.—Decision of register affirmed.[2]

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[2] Under section 67, sub-section f, of the Bankruptcy Act of 1898, all liens obtained through legal proceedings within four months prior to the filing of the petition in bankruptcy, where the person was insolvent at the time the lien was obtained, are dissolved. *See* also sub-section c and the remarks of Collier on these sections in his work on Bankruptcy (Edition of 1907), pages 782-785. The distribution of the proceeds of the partnership property first to the joint creditors, and the separate property of each partner first to the creditors of that partner, is the same under the present Act, *see* section 5, sub-section f, page , *infra,* as it was under the Act of 1867, section 36, and under the Act of 1841, section

In *Averill* v. *Loucks,* 6 Barb. 470, 1849, 478, Paige, P. J., regards a partner who has given a mortgage on his separate property as one who guarantees a firm debt and therefore entitled to the rights of a guarantor. If the firm fails he has a right to insist that the property of the principal debtor of the firm be first used to pay the debt, and if his property is taken to satisfy the debt he has a right to be subrogated to the rights of the firm creditor against the firm. The separate creditors of the partner have the same rights as their debtor. It is suggested that the student compare the assumption on which these conclusions depend with cases pages 714-726, *infra.*

CHAPTER XII

MARSHALLING ASSETS IN PARTNERSHIP CASES.

CRAVEN *v.* KNIGHT.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD KEEPER NORTH, 1682.

Gooding's Bankruptcy, 187.

THE bill sets forth that the defendant, George Widdows being indebted to the plaintiffs, became bound to them in several bonds; and the said Widdows, and the defendant Berman for several years past, were copartners, and Widdows by articles of copartnership was entitled to two-thirds of the whole stock, and the defendant Berman to one third part; the said Widdows and Berman, 25 August last, became bankrupts, and a Commission of Bankruptcy was awarded against them; the Commissioners of Bankrupts assigned all the estate of the said bankrupts to the defendant Knight and others, and refused to let the plaintiff's creditors of the bankrupts to come in, and intend to divide the said estate amongst the joint creditors of both the bankrupts, by reason whereof the plaintiff's debts will be utterly lost.

The defendants insist that it was agreed by indenture of copartnership that all such debts as should be owing on the joint account should be paid out of the joint stock; and at the end of the partnership each copartner take and receive to his own use his share of the joint stock, and that the joint stock or trade should not be charged with the private or particular debts of either of the partners, but that each should pay their private debts out of their particular estates,

not included in the joint stock: That if both the said parties should be living at the end of the first three years of the six years that the said Berman should come in joint partner accordingly; and during the said joint trade, the copartners became jointly indebted to the other defendants, Knight, etc., in 6000*l*, and that Widdows became indebted to the plaintiffs, as aforesaid, without the consent of Berman; and the money due upon the said bonds was not brought into the account of the joint stock; and the said Widdows was only a surety, and received none of the money; and the defendants insisted that the joint creditors ought to be first paid out of the estate of partnership; and that the commissioners have no power to grant the joint estate to pay the plaintiffs, they being separate creditors of Widdows: And if a surplus of the joint estate, after the joint creditors paid, then the plaintiffs can have but a joint moiety of such surplus, towards their satisfaction, the said Berman's moiety being not liable to pay the said Widdows his separate debts; and the debts then claimed were the proper debts of the said Widdows; and yet after all the joint debts are paid, there will be an over-plus; so that thereby the said Berman will be discharged, and have money paid unto him: But if the plaintiff and other separate creditors of Widdows be admitted to the joint estate, there will not be sufficient to pay the joint creditors; so that thereby not only Berman's estate will be applied to pay Widdows' debts, but will be liable to the joint creditors. But there can be no division of the joint estate whereby to charge any part thereof with the private debts of either party; and till the joint debts are paid, and till division made of the surplus, both parties are alike interested in every part of the said joint stock; that the commissioners have no power by the commission to administer an oath to the plaintiffs for proof of their debts, they claiming debts from the said Widdows only; and the commission is against Widdows and Berman jointly, and not severally, and therefore cannot admit the plaintiff's creditors.

The Court declared, that the estate belonging to the joint trade, as also the debts due from the same, ought to be divided into moieties, and that each moiety of the estate ought to be charged in the first place with a moiety of the said joint debts, and if there be enough to pay all the debts belonging to the joint trade, with an over-plus, then such over-plus ought to be applied to pay the particular debts of each partner; but if sufficient shall not appear to pay all the joint debts; and if either of the said partners shall pay more than a moiety of the said joint debts, then such partner is to come in before the said commissioners, and to be admitted as a creditor, for what he shall so pay over and above the moiety; and was decreed accordingly.[1]

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[1] Christian in his "Bankruptcy Law," 1814, vol. 2, p. 244, says: "If the joint estate is divided, and the joint debts are divided, one cannot see how the excess can exist more on one side than on the other."

The report of this case in 2 Chan. Cas. 139, *sub. nom., Craven* v. *Widdows,* is as follows:

"Two partners in trade put in each an equal stock, and agreed by covenant that the stock should pay the debts of the stock, and neither of their separate debts should charge the stock, but only his own estate, or to that effect; they both became bankrupts, and a commission against them both, one of them owed separately more than the other. The question was between separate creditors of each bankrupt, and the creditors on account of the joint stock, for these would exclude the separate creditors to charge the joint stock, but that it should satisfy the stock debts. But the opinion of the Lord North, *contra.* For the covenant of the partners cannot bind any of their creditors, but only themselves. *Quære.* How the separate creditors could have other title than those under whom they claim."

Richardson v. *Gooding,* 2 Vern. 294, 1693: (A and B were partners. At the instance of the separate creditors of A a commission was taken out against A and the commissioners, for some reason unknown, assigned to the assignees in bankruptcy the firm property. Bill by a firm creditor against the assignees for an account, and that the firm creditors should first be paid out of partnership stock. Decreed for the plaintiff. *Accord: Dusfresnay* v. *Prevost,* 2 Eq. Cas. Abr. 110, 1734.)

"Statutes of bankruptcy are of considerable antiquity in England, the first having been passed in the reign of Henry VIII. The bankrupt law of the present day descends from statutes passed in the reigns of Elizabeth and of James I., which have been frequently amended from that time to this. Previous to the year 1822 these statutes contained but a single mention of bankrupt partners or partnerships, viz., that contained in St. 10 Anne, c. 15, § 3, which provided that the discharge of a bankrupt should not discharge a bankrupt partner or co-obligor. Before 1822, therefore, the rules regulating the distribution in bankruptcy of the joint and separate estates of partners were established altogether by judicial decision." Per Lowell, J., *in re* Wilcox, 94 Fed. Rep. 84, 1899, p. 85.

Ex Parte CROWDER.

In the High Court of Chancery, Before Lord Cowper, 1715.

2 Vernon's Reports, 706.

A and B being joint traders, a commission of bankruptcy issued against them; their separate creditors now applied by petition, that they might be let in for their debts upon the respective separate estates of the bankrupts, under that joint commission; the separate estates being of small value, and would not bear the charge of taking out two new commissions against them separately.

The Lord Chancellor ordered them to be let in to prove their respective separate debts upon the joint commission, they paying contribution to the charge of it, and directed that as the joint or partnership estate was in the first place to be applied to pay the joint or partnership debts; so in like manner the separate estate should be in the first place to pay all the separate debts; and as separate creditors are not to be let in upon the joint estate, until all the joint debts are first paid; so likewise the creditors to the partnership shall not come in for any deficiency of the joint estate, upon the separate estate, until the separate debts are first paid.

Ex Parte COOK.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD CHANCELLOR KING, 1728.

2 Peere Williams's Chancery Reports, 499.

Two joint traders became bankrupt, and a joint commission of bankruptcy is taken out against them, upon which the commissioners make an assignment of the real and personal estate of the two bankrupts, or either of them; afterwards the separate creditors take out separate commissions against these two bankrupts, and the commissioners on the separate commission assign over the separate effects and estate to other assignees; and now the assignees under the separate commissions, applied by petition to the court, that they might be at liberty to sue at law for the separate estate.

Lord Chancellor: It seems to me, that the assignment made by the commissioners upon the joint commission, passes as well the separate as the joint estate of the two partners the bankrupts, consequently the assignees on the separate commissions can make nothing of their action at law, and I will not suffer them to spend and waste the estate in vexatious suits there; but if they will join in a bill in equity for an account of the separate estate, I will not hinder them.

It is settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors, and if there be on the other hand a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint credit-

ors. But in this case, for the ease of both parties, let it be referred to a commissioner in each of these commissions, to take an account of the whole partnership effects, and also of the separate effects and estates of each of the partners; and if the commisioners find anything difficult, they are to be at liberty to state it specially; and with regard to the surplus of the partnership effects, beyond what will pay the partnership debts, and also touching the surplus of the separate effects, if there shall remain any, over and above what will pay the separate debts, each side to be at liberty to apply to the court concerning any of the said surpluses.[1]

[1] Lord Hardwicke in the Matter of the Simpsons, 1 Atk. 137, 1752, p. 138, said: "Formerly, where there were several partners, they used to take out several commissions against each partner, as well as a joint commission. This practice being of late thought a very unreasonable one, as occasioning great confusion with regard to bankrupt's effects, has been discountenanced."

Ex Parte BAUDIER.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD HARDWICKE, 1742.

1 *Atkyns Reports*, 98.

A SEPARATE commission taken out against each of two persons who had traded in partnership, which was dissolved before their bankruptcy; the joint creditors petition to be admitted to prove their joint debts under each of their commissions.

Lord Chancellor: Where there is a joint commission taken out against partners, separate creditors may come in under such a commission and prove their debts, and joint creditors shall be satisfied out of the joint estate, and separate creditors out of the separate estate, because the assignment in that case is of the whole estate.

But where there are two persons who have been partners and yet the commissions are taken out against them as separate traders, their creditors upon the joint estate cannot be admitted to prove their joint debts under each commission, for they have an equitable right, in case there should be any surplus of the estates of the two bankrupts after the separate creditors are satisfied.

Nor do I think it proper to appoint a receiver on behalf of the joint creditors, to get in the joint effects of the bankrupt, but they must proceed in the common course, by taking out a joint commission.[1]

[1] *See, however, ex parte* Voguel, 1 Atk. 132, 1843: (A and B were partners. They dissolved. A separate commission had been taken out against one. The joint creditors petitioned that the joint effects seized under the separate commission might be divided among the joint creditors. Lord Hardwicke refused the petition, giving the petitioners liberty to bring a bill in equity for the same purpose. He gave the joint creditors liberty to come in under the separate commission and prove their debts, without directing whether they had any right to the assets, or any prior claim on the assets due to the sale of the joint property); *also ex parte* Crisp, 1 Atk. 133, 1744: (A and B were partners. The joint creditors sued out a commission against B. Lord Hardwicke doubted the right of the joint creditors to take out such a commission, and directed a trial before WILLES, C. J. The proceedings in the Common Pleas are reported in Willes, 467. It was decided that joint creditors could take out such a commission, but that the distribution of the assets between the joint and several creditors could only be determined by a bill in equity. Lord Hardwicke acquiesced in this opinion.)

Ex Parte HODGSON.

In the High Court of Chancery, Before Lord Thurlow, 1785.

2 W. Brown's Chancery Reports, 5.

Burney the bankrupt was partner with Davidson, who is in the East Indies, and, being indebted separately to , to whom he had given a note, she pressed him for a better security; upon which he gave her a partnership note. Upon a separate commission against Burney, she proved this note; and the present petition was, that the proof of this joint debt upon the separate commission might be rescinded.

Lord Chancellor refused the prayer of the petition, there being no distinction as to sole or separate debts, and said he thought proper to declare that debts, whether sole or joint, ought to be paid out of the bankrupt's estate; which is composed of his separate estate, and of his moiety of the joint estate, and therefore ordered that she should come in *pari passu* with separate creditors.[1]

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[1] *Accord: Ex parte* Page, 2 W. Bro. Ch. Cas. 119, 1786; *ex parte* Flintum, 2 W. Bro. Ch. Cas. 120, 1786.

The report of *ex parte* Hayden, in 1 W. Bro. Ch. Cas. 454, a case decided about the same time as *ex parte* Hodgson, where Lord Thurlow permitted the joint creditors to share equally in the separate estate with the separate creditors, no joint commission having been issued, emphasizes the fact that there were no joint assets. The fuller report of the same case, however, in Cooke's Bankrupt Laws, Dublin Ed., 1786, p. 7, makes the question of partnership or no partnership the real question in the case, and the right of the firm creditors to share equally in the separate assets where there was no joint commission, apparently did not depend on the non-existence of a joint estate. Under a joint commission Lord Thurlow distributd the joint effects to the joint creditors and the separate effects to the separate creditors. *Ex parte* Market, 2 W. Bro. Ch. Cas. 15, 1785.

Lord Loughborough on March 8, 1794, issued an order, see 4 W. Bro. Ch. Cas. 548, which permitted the separate creditors to prove their debts and have the separate estates administered, under a joint commission, as per the rule in *ex parte* Crowder, *supra*, p. 668, without the necessity of going to the trouble and expense of bringing a petition.

Ex Parte ELTON.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD LOUGHBOROUGH, 1796.

3 Vesey Junior's Reports, 238.

WILLIAM FRY and others carried on business in partnership as cotton manufacturers under the firm of William Fry and the Rawleigh Company. In July, 1792, in consideration of 1000*l.* paid by the petitioners to William Overend, one of the Rawleigh Company, a bill of exchange for that sum was duly endorsed to the petitioners. The bill was dated the 9th of July, 1792, and was drawn upon Fry and his partners, and accepted thus in the hand-writing of Fry: "Accepted, W. Fry and Rawleigh Company." In May, 1793, a separate commission of bankruptcy issued against Fry as distiller, dealer and chapman. The bill not being paid upon applications to the Rawleigh Company, the drawers, and the indorsers, the petitioners attempted to prove the debt for the purpose of receiving a dividend under the commission. The commissioners reserved a dividend upon the claim, in order that the opinion of the Lord Chancellor might be taken.

The opposite cases upon this point, which are collected 1 Cooke's B. L. were cited. [7th Edit. by Mr. Roots, 244, &c.; 8th Edit. 259, &c.]

Lord Chancellor: This petition seems to me to be a matter under very pressing circumstances. I do not mean to decide it now; for upon considering what has been stated and looking into the cases collected by Mr. Cooke it appears to have been understood for some time, that a joint creditor is entitled to prove and receive a dividend from the separate estate. At the same time I understand from the Attorney General that he does not think that settled as matter of law, but of convenience, and subject to this limitation; that if the

assignees of the separate estate think fit or will undertake to file a bill, the creditor admitted to prove is to be restrained from receiving a dividend. If it stands so, it is an order, that can only be made here in this Court: it is impossible for the commissioners either in town or country to admit, as this petition supposes, a joint creditor to take a dividend under the separate commission; for they have no authority; it is impossible they can decide of themselves; for an option to be given to assignees is a thing that can only be done by an order here; the commissioners have no power to do it. The consequence therefore in every such case, is, that there must be a petition. There is another inconvenience, if the matter remains as it now stands: one set of commissioners acting upon the authority of the first edition of Mr. Cooke's book would certainly refuse the claim; another set acting upon the second edition would certainly admit it. It stands therefore in a situation, in which commissioners would find great difficulty how to act. It has been understood for a considerable time, according to Mr. Cooke, that there is no difficulty in the Court's directing the commissioners to receive the proof of the joint debt. Antecedent to these authorities, I should have thought it perfectly clear, it could not be done; and that the utmost length, they could go, was, that a joint creditor, where there is a separate commission, is to be admitted to prove only for the purpose of assenting to or dissenting from the certificate, and receiving such surplus beyond the amount of the separate debts, as joint creditors would be entitled to claim, where there are two commissioners. I doubt, whether it is possible to innovate upon that, which was the law formerly; for though a commission is an execution, and the joint creditor has such an interest as enables him to take out a separate commission, yet the consequence does not follow. There are cases antecedent to those cited. In Lord King's time it was determined, that a joint creditor might be a good petitioning creditor, though the commission is only against one partner; that the joint creditor does no more in taking his execution, passing over

his action, than bringing the separate effects to be administered in bankruptcy. But it is not treated any longer as an execution at law; for the effects taken under it are not disposed of as at law, but fall immediately by the direction of the statute under the administration of this Court; which is to make an equitable distribution among the creditors, to admit all equitable claims upon the effects, and to divide them ratably. It has long been settled, and it is not possible to alter that, that each estate is to pay its own creditors.

With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution he has taken out. He is precluded from suing at law; and it would be against all Equity, having done it for their benefit, to refuse him the fruit of that for his own debt. But any other joint creditor is in exactly the case of a person having two funds; and this Court will not allow him to attach himself upon one fund to the prejudice of those who have no other, and to neglect the other fund. He has the law open to him but if he comes to claim a distribution, the first consideration is, what is that fund, from which he seeks it. It is the separate estate; which is particularly attached to the separate creditors. Upon the supposition, that there is a joint estate, the answer is "apply yourself to that: you have a right to come upon it; the separate creditors have not; therefore do not affect the fund attached to them, till you have obtained what you can get from the joint fund." There would be no great inconvenience, if he could put them in his situation as to the joint fund: but I doubt very much, whether that is possible; for suppose in the case of A and B, partners, the former remains solvent, the latter becomes a bankrupt, and there is a joint debt of 1000*l*. The creditor making his claim first against the separate estate, paying a dividend of 10*s*. in the pound, receives 500*l*. Can the assignees claim against the solvent partner what they have paid? His answer would be they could only claim the same right the bankrupt could; and as against the bankrupt he is entitled to retain; he has

paid his moiety of the partnership debt. If the case is turned the other way, and the creditor first sues the solvent partner, he recovers all the debt against him; and he has a right to come in as a separate creditor of the bankrupt to the amount only of a moiety of that debt; for a moiety only of the debt of the partnership he could have recovered against him, if he had been solvent. That makes a very great difference to the separate creditors. I was led to consider another thing: is it possible to admit a separate creditor to take a dividend upon the joint estate ratably with the joint creditors? No case has gone to that; and it is impossible; for the separate creditor at law has no right to sue the other partner. He has no right to attach the partnership property. He could not only attach the interest, his debtor had in that property. If it stands as a rule of law, we must consider, what I have always understood to be settled by a vast variety of cases, not only in bankruptcy but upon general Equity, that the joint estate is applicable to partnership debts, the separate estate to the separate debts. Another difficulty is, whether really it is just to put it to the assignees in behalf of the separate creditors to assert the right of the creditor making the claim, to go against the joint estate. The creditor coming in upon the separate estate is first to answer the question, why he does not go against the joint estate. It may be said, "the law is open to you; it is not open to us. You put us to file a bill against the other partners to discover and apply the partnership fund. You have a much quicker remedy; sue the partnership. You need not wait the account. They will settle it rather than put you to that; at all events you have a legal execution against them." Another consideration is, that the great object of the law in establishing this sort of authority, in which I now sit, is to make a speedy distribution and to avoid suits. The necessary consequence of admitting a joint creditor to prove against the separate estate is in every such case to make a Chancery suit; and the right of the separate creditors to the administration of their fund is frustrated.

I throw out this, desiring extremely to have the assistance of the Bar, and of those who are peculiarly conversant with the subject, to point out the balance of convenience and inconvenience; whether it is right to adhere to what is the rule according to the last determination, or to reconsider and recast the whole. There is nothing so inconvenient as leaving a point, that must so frequently occur, to any ambiguity. It cannot remain, as it now stands. If it is a petition, of course it is under singular circumstances; for there is nothing purely of course to be done by petition to me, that I cannot by a general rule direct the commissioners to do: I doubt, that is impossible here; for they could not put that guard upon it, that it should not be a general order, but that the assignees might stop him from receiving a dividend, till they had taken out of the joint estate what he should draw from the separate estate. Wherever my order will procure an account of the joint estate, there can be no harm; for then I should give the usual directions to apply the funds respectively, the joint estate to the joint debts, the separate to the separate debts; the surplus of each to come in reciprocally to the creditors remaining upon the other. But unless I can do that, every order, I can make, to let a joint creditor receive a dividend from the separate estate would carry a Chancery suit in the bosom of it, to have the joint estate brought into the fund, to prevent the separate estate from being exhausted; and I should make the order, and in the course of ten days suspend it by preventing him from receiving the dividend.

Let it stand over; and if it is possible to bring it on in the course of these petitions, I should be extremely glad to have it very fully discussed.

July 28. Attorney General [Sir John Scott], for the Petition, proceeding to argue upon the cases, that had been cited before, was stopped by the Court.

Lord Chancellor: I am aware of all those cases; but the difficulty, that has struck me upon it, is, that what I order here to-day, sitting in bankruptcy, I shall forbid to-morrow

sitting in Chancery; for it is quite of course to stop the dividend upon a bill filed. The plain rule of distribution is, that each estate shall bear its own debts. The Equity is so plain, that it is of course upon a bill filed. The object of a commission is to distribute the effects with the least expense. Every order I make to prove a joint debt upon the separate estate must produce a bill in Equity. It is not fundamentally a just distribution, nor a convenient distribution; because it tends to more litigation and more expense. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance. It is a contrivance to throw this upon the separate estate; for what hinders them from recovering at law this debt against the partnership; for it is money paid to one of the partners. They have nothing to do but to bring an action against the partners. The affairs of the partnership may be very much involved: but if they are arrested, they would pay it. It is not stated as a case, where there are no joint effects. Here it is only, that there are two funds. Their proper fund is the joint estate; and they must get as much as they can from that first. There is this singularity attending this case; that the whole transaction between them and Fry is a partnership transaction. The money was paid to one of the partners; most probably for the use of the partnership: the bill was drawn and accepted in the name of the partnership. I have no difficulty in ordering them to be admitted to prove; but not to receive a dividend. Will the assignees sue the partners in the name of the petitioners? It occurred to me, when this came on before, and no answer was given to it, that if the rule stands as you suppose, there never would be a joint commission; but they would take out a separate commission against each partner.

The order was, that the petitioners shall be admitted, but not to receive a dividend; and that the dividend upon

the proof shall be reserved, till an account is taken of what they have or might have received from the partnership effects.[1]

[1] *Ex parte* Clay, 6 Ves. 813, 1802. (Lord Eldon: "The rule that prevailed in Lord Hardwicke's time, and down to the time of Lord Thurlow was, that joint creditors should not be admitted to prove under a separate Commission for the purpose of receiving dividends with the separate creditors. Lord Thurlow altered that upon much consideration; thinking, the joint creditors ought to be admitted with the separate creditors; and left it so, when he left this Court. Lord Loughborough thought, that was not right; and got back again, not quite to the old rule; but he settled it, that they should prove only for the purpose of keeping separate accounts, but not to receive a dividend. I do not presume to say, which is the best rule; except, that the last is open to this difficulty; that the creditor is not a party to the proceedings under the Commission. But I think it better to follow the rule, that I find established, than to let it be continually changing, so that no one can tell, how it is. Therefore unless some more prominent mischief can be pointed out, take the order according to Lord Loughborough's rule.")

GRAY *v.* CHISWELL.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD ELDON, 1803.

9 Vesey Junior's Reports, 118.

THE bill was filed by annuitants, under the will of John Cock, against the executrix and the heir at law of Mr. Chiswell; who was the executor under that will, for an account, etc. The usual accounts were directed; and by the report a considerable debt from the estate of Mr. Chiswell to that of Cock was established; including the penalty of a bond of 8000*l.*; for which sum the Master stated the plaintiffs to be specialty creditors; and the general balance beyond that was 2471*l.* 15*s.*; a simple-contract debt. The joint creditors of Chiswell and Nantes who had proved their debts under a Commission of Bankruptcy against Nantes, as surviving partner, went in under an order; and proved their debts before the Master. No appropriation had been made to answer the annuities of the plaintiffs. Chiswell died seised of freehold estates. The cause coming on for farther directions, the simple contract creditors of Chiswell claimed to stand upon his real estate to the extent of 8000*l.*, the bond debt proved by the plaintiffs, and paid out of his personal estate, and the only debt by specialty, to which he was liable; and that the said sum may be raised by sale or mortgage of the real estate devised to the executrix. A question arose between the joint creditors and the separate creditors of Chiswell; the latter contending, that out of Mrs. Chiswell's balance, when paid in, and the 8000*l.*, when raised and paid in, the separate simple contract of Chiswell may be paid their respective debts in preference to the joint creditors of Chiswell and Nantes; and that the balance only, after such payment, may be paid over to the assignees, to be distributed to the joint creditors under the commission.

The joint creditors insisted upon their right to come in *pari passu* with the separate creditors of Chiswell against his separate estate. It was admitted, that the joint estate was insolvent, and would pay only an inconsiderable dividend; and that, the surviving partner having brought into the firm an inconsiderable sum, upon a final adjustment the joint estate would be greatly indebted to the separate estate.[1]

The Lord Chancellor: This question is new in specie, and has not been determined by any of the cases. These joint creditors ask a great deal more than they could in bankruptcy; for there they could not touch the separate estate, until the separate creditors were fully satisfied. They have had their demand effectuated against the joint estate surviving; and now contend, that by the accident of the death they shall be, not only upon an equal, but upon a better, footing, as against the separate creditors, than if the party had lived, and had become a bankrupt. It would be extraordinary to say that.[2]

The decree declared, that the separate creditors of the testator, Chiswell, are entitled in the first place to be paid their respective debts out of his separate estate; and that the joint creditors are entitled to the residue.

[1] The Reporter's notes of the arguments of counsel are omitted.

[2] The rest of the opinion is omitted.

Ex Parte HILL.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD ELDON, 1802.

2 Bosanquet and Puller's Report, New Series, 191, *note a.*

COPLAND and M'Knight jointly purchased a quantity of rum. This they pledged with the petitioners, who lent their money on it, and in fact to pay for it. They had no other dealings together as partners. Rum fell in value. The rum pledged was sold, and did not produce the amount of the money lent. The petitioners brought a joint action, in which M'Knight let judgment go by default. M'Knight and Copland both became bankrupts under separate commissions, and the commission against Copland was dated the 31st May, but a verdict was recovered against him by the petitioner on the 26th of June last for 2287*l.* 6*s.* 2*d*, the amount of the moneys due after deducting the produce of the rum. The time of the sale of the rum did not appear. The commissioners under Copland's commission considered this as a joint debt, and refused to admit the proof of it except for the purpose of assenting to, or dissenting from the certificate.

The petitioners prayed that the commissioners, acting under the said commission against Robert Copland, might receive the proof of the amount of the petitioner's debt and costs, when taxed, and that the petitioner might be paid dividends thereon, rateably with the other creditors of the said Robert Copland. The two points raised were, 1st, that there was no joint estate, and therefore that the debt ought to be proved against each separate estate. *Ex parte,* Haydon, Cooke, Bank, Laws. 240. 2dly, that the debt was a debt which might have been proved before the verdict, and therefore that the costs ought to be proved, though the verdict was after the commission. *Lewis* v. *Peircy,* 1 H. Bl. 29. *Watts* v. *Hart,* 1 Bos. & Pull. 134.

On the other side it was said that here was a joint estate, viz. the goods pledged. 2dly, that the general rule is that where the verdict is after the commission, costs cannot be proved. * * *.

Lord Chancellor: The case *ex parte* Elton, 3 Ves. jun. 238, has settled the matter, and therefore I will not unsettle it, but should rather have adhered to Lord Thurlow's rule. But when there are no joint effects, that takes the case out of *Ex parte* Elton. Joint effects means such as are under the administration of assignees to distribute, not as in this case, where the only joint effects were those pledged to the petitioners, to more than the amount.[1]

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[1] The part of the opinion which deals with the question of costs is omitted. Lord Eldon decided that the costs could not be proved.

Prior to the decision in this case, Lord Loughborough, after his decision in *ex parte* Elton, had, in *ex parte* Abell, 4 Ves. 837, 1799, directed that the joint creditors should receive nothing from the separate estate until the separate creditors had been paid in full, although in that case there does not seem to have been any joint estate, and the assertion is made by counsel that all the other partners were insolvent. In *ex parte* Pinkerton, 6 Ves. 814, note, 1801, Lord Eldon, in the absence of a joint estate, allowed the joint creditor to prove under a separate commission. This was merely the rule of *ex parte* Elton. Lord Eldon's language, however, as reported, would indicate that he ultimately allowed the joint creditors to come in *pari passu* with the separate creditors as he did later in our principal case, for he says: "it seemed very singular, that the nature of the debt, should turn upon the fact, whether there is joint property, or not." Besides, the expression "right to prove" is used by reporters as equivalent to "right to prove and take a dividend."

Compare with our principal case the following cases:

Ex parte Peake, 2 Rose 54, 1814. (The joint estate amounted to only 1£ 11s. 6d. The joint creditors were not allowed to come in on the separate estate. Lord Eldon: "If in point of fact there is joint property, whether to the amount of five pounds or five shillings, it is an answer to this application" [of the joint creditors]).

Ex parte Kennedy, 2 DeG. M. & G., 228, 1852: (The joint estate amounted to £13, which were entirely exhausted in the payment of costs. *Held,* that the joint creditors could not receive any dividend from the joint estate until the separate creditors were paid in full.)

In re McEwen, 12 Nat. Bk. Reg. 11, 1874: (*Held,* that the 36th section of the Act of 1867 regarding the distribution of assets in cases of the bankruptcy of a partnership, which directed that the separate creditors should have priority on separate funds, applied only where there was a net balance of partnership assets after paying costs, and that, where there was no such balance, the partnership and prior creditors shared *pari passu* in individual assets. *Accord: In re* Slocum, 1879, cited 5 Fed. 50.)

Harris v. *Peabody,* 73 Me. 262, 1881: (A and B were partners. The firm was insolvent, and its assets, amounting to only $1.19, were absorbed in the expenses of the sale. B was insolvent, A having no

assets or individual debts. The joint creditors were allowed to come in *pari passu* with B's individual creditors on B's separate assets.)

See also: In re Marwick, 2 Ware 229, 1845: (The joint estate consisted of worthless claims. A separate creditor of one partner purchased one of these claims for $40 for the purpose of creating a joint estate. *Held*, he had created it, and, therefore, the separate creditors of the partner should be paid in full out of the separate estate before the firm creditors received anything, a ruling which prevented the joint creditors receiving anything, as the separate estate was exhausted in paying the separate creditors.)

Ex Parte KENSINGTON.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD ELDON, 1808.

14 *Vesey Junior's Reports*, 447.

IN these petitions and three others in the paper of bankruptcy the question was, whether a joint debt could be proved under a separate commission for the purpose of receiving dividends with the separate creditors, where there was no joint estate, but there was a solvent partner.

Mr. Cooke, in support of the petition of the joint creditor to prove, mentioned *Ex parte* Elton, *Ex parte* Abell, *Ex parte* Pinkerton; in which last case there was a solvent partner, abroad, and not likely to return; and there was no joint property; and the proof was ordered.

Sir Samuel Romilly, for the assignees, opposed the petition; insisting, that the order made according to the arrangement in *Ex parte* Abell, that the creditor should take a dividend upon a sum, not exceeding an eighth part, under a commission against one of eight partners, could not be supported; the consequence of admitting the proof, in respect of the bankrupt's proportion of the debt upon a contribution, being, that all the dividends must be delayed, until the accounts of all the partnership debts were taken; that in *Ex parte* Pinkerton the order was made on the ground, that, the solvent partner being abroad, the creditor could not without great difficulty resort to the other fund; but, in general cases the reason against admitting the proof, where there is joint estate, that there is another fund, to which the creditor may resort, applies, where there is a solvent partner.

The LORD CHANCELLOR: This question respecting joint and separate creditors has been much agitated. Lord Thurlow thought, the joint creditors were entitled to prove; as, though the contract was joint, the execution was separate.

Lord Rosslyn when he first came to this bench, preferred that rule; which he had often agitated at the bar; but his Lordship afterwards established the rule in *Ex parte* Elton. When I succeeded Lord Rosslyn, I declared, that, though the principle of that rule appeared to me to be doubtful, the rule was settled; and ought not to be shaken. In *Ex parte* Pinkerton I was influenced by the circumstance, that the solvent partner was abroad. I think, in this case a proof cannot be made without resorting to the solvent partner.[1]

[1] In a subsequent petition *Ex parte* Kendall, April 5, 1808, the case *Ex parte* Kensington was acted upon without comment.

Ex parte Morris, Mont. 218, 1831: (A, B, C, D, E were partners. They granted an annuity to F. A and B were bankrupts, C was abroad, D had applied to take the benefit of the Insolvent Act, admitting £1,600 liabilities and no assets. There were no joint assets. A Commission was issued againt E. F tried to prove and take a dividend under E's estate. *Held,* that he could not do so, as D had not been formally declared a bankrupt.) *Accord: Ex parte* Janson, Buck 227, 1818.

BELL *v.* NEWMAN.

IN THE SUPREME COURT OF PENNSYLVANIA, 1819.

5 *Sergeant and Rawle's Reports*, 78.

JOHN WADDINGTON was the surviving partner of Thomas Cookson, a merchant residing in England. Waddington lived in Philadelphia, and at the time of his death was indebted to sundry persons on his partnership account, and to William Bell on his private account. The defendant had in his hands to be administered, some private property of John Waddington, and also some of the partnership property of Cookson & Waddington, but not enough to pay the partnership debts. The question submitted to the Court was, whether the separate property should be applied in the first instance to the payment of the debt due to William Bell, or whether the partnership creditors should come in *pro rata*.[1]

TILGHMAN, C. J.: [*Held*, that the Act of April 19, 1794, giving to all creditors of an equal nature an equal share of the intestate's estate in case of a deficiency of assets, could only be satisfied by directing that the separate creditors should receive as much out of the separate property as the joint creditors received from the portion of such separate partner in the joint property, and then that the balance of the separate property should be divided among the joint and separate creditors *pro rata*.][2]

GIBSON J.: In bankruptcy the rule, that the joint and separate estates shall be marshalled in favour of the respective creditors, is undoubted: but I have found no decision on the subject of its applicability, in *England*, and but one in this country, to cases of *insolvency*. It is in-

[1] The Reporter's notes of the argument of council are omitted.

[2] His opinion is omitted. It has not been followed in Pennsylvania. *See* Black's App., 44 Pa. 503, 1863. A similar rule, however, would appear to prevail in Kentucky. See *Fayette Nat. Bk.* v. *Kenney*, 79 Kty. 133, 1880, p. 140.

deed said by Mr. Watson in his *Treatise on the Law of Partnership,* p. 370, that there is a different rule as to insolvency; but *Burn* v. *Burn,* (3 Ves. jun. 573), which he cites, most clearly contains no such distinction. That was the case of a bond joint on its face and executed by one partner, in the name of the firm, to secure a partnership debt; and it was held it should be considered joint and several against the separate creditors, and the obligee let in for a separate specialty debt, the evidence that the parties *intended* to be severally bound, being clear. All the Court did, therefore, in that case, was to correct a mistake, by putting the parties in the situation they would have been in, if no accident had happened: and it is very clear that a partnership creditor, by a joint and several bond, may elect to come in as a separate creditor, although by doing so, he abandons his claim on the joint estate, till the other creditors are paid. *Ex parte* Banks, 1 Atk. 106 *Burn* v. *Burn,* was that case: but the Court did not decide what the obligee's rights would have been in the character of a joint creditor, they merely reformed the instrument according to the original *intention* of the parties, which is a very familiar proceeding in equity. In *England* I apprehend it is not decided, whether the rule be peculiar to bankruptcy, or a general principle of equity applicable to all cases of marshalling assets between joint and separate creditors. In no case does its precise foundation appear. Lord Thurlow denied it altogether: Lord Rosslyn puts it on grounds partly of convenience, and partly of abstract equity; and subsequent chancellors have sustained it, doubting its propriety. It certainly does not arise from any provision of the statues concerning bankruptcy; for not one of them mentions partners in relation to this question. It could not have been originally founded in convenience, which never can excuse, much less justify a departure from justice, and the rights of the partnership creditors ought not to be affected by any consideration of embarrassment to third persons arising from their en-

forcement. The only inconvenience would be the postponement of settling the separate estate until the partnership accounts were taken and settled, and this might have been surmounted, or at least endured. The rule therefore must be deemed, and I think, justly, an abstract principle of equity, operating in all cases where chancery administers the assets of an insolvent partner. There is nothing in the nature of the commission itself to create a difference; for though it is sometimes called a statute execution, it is in fact nothing more than the means and instrument of equity, and does not constitute nor can it alter the abstract propriety of any rule of distributing among creditors the remnant of their own property. At law, or even in equity, where there is no insolvency, a joint creditor may go directly against the separate estate of a deceased partner, and it is by viewing the commission as analogous, and a means *of enforcing a right* against the *partner,* without at the same time considering the proceedings under it, as a *process of distribution* among the creditors that doubt with respect to the solidity of the rule in question is generated. The ground of Lord Thurlow's opinion was, that although the contract was joint, yet execution being several might be had against the separate estate, and by preserving the analogy between an execution and a commission, the joint creditors might come in. If, in despite of this technical notion, the rule still holds in bankruptcy, *a fortiori,* it ought, where all is distributory without the most remote analogy to an execution. But it appears to me, the rule is founded in the most substantial justice. Why should any class of creditors in preference to the rest, be exclusively entitled to the joint fund, and concurrently entitled to the separate estate? Equality is equity; and the joint creditors have already an immense advantage over the separate creditors in being exclusively entitled to the partnership fund: it is the largest; for men in trade usually embark their all in it, and seldom have much separate property. And, independent of distributive

rights, the joint creditors have a degree of security for their debts, and facilities in recovering them, which the separate creditors have not: they can sell both joint and separate estate on an execution, while the separate creditor can sell only the separate estate, and the interest in the concern that may remain to the partner, after the accounts of the debts and effects of the partnership are taken, as between the partners and their creditors, and as between the partners themselves. This exclusive liability of the partnership estate to the joint creditors is founded on no equity peculiar to themselves, but results from the nature of the contract of partnership which requires the joint debts to be paid before the equity can be settled between the partners, each being individually liable till all is paid. Concede the present question to the joint creditors, and you give them in effect, a monopoly of the insolvent whole estate. What merit do they possess that the separate creditors may not lay claim to? In the usual course of transactions, each class indiscriminately trusts to the whole estate, both joint and separate. Judge Cooper, in his *Treatise on the Bankrupt Law,* page 300, arguing with his usual force and ingenuity against the equity of the rule in bankruptcy, founds himself on the assumption that the joint creditors are the exclusive contributors to the mass of the joint estate, and therefore that the remnant of it is peculiarly their property; and that both joint and separate creditors contribute to the separate estate, although in an unequal degree, the debts due the separate creditor being mostly contracted for articles of consumption; and that while the partnership debts have a tendency to increase the whole mass of the estate, the separate debts tend to decrease it. All these assertions, as general propositions, are unfounded. As to the first, an insolvent joint fund consists of the remnant of what was originally *taken from the individual estates of all the partners,* and, by the very act of turning it into stock, put beyond the immediate reach of those who were their separate creditors at the

time: and as to the second, where the concern has been a losing one, there is no great reason to presume the profits of the business added much to the separate property. The stock can increase the latter, only by being improperly withdrawn from trade for that purpose; and as the other partners have a direct interest in preventing such a measure, it is unreasonable to believe that anything like a majority of cases of failure of the joint fund can fairly be attributed to that cause. It is no more universally true, that every partnership debt brings as much property into the joint fund as it takes out, than that each separate debt adds its own amount to the aggregate of the separate estate. In either case, the purchase of articles of consumption excepted, the matter depends entirely upon whether the speculation were a good or a bad one. As to articles of consumption, which is the only class that does not add to the bulk of the separate estate, if they are purchased on credit, nothing is thereby drawn from the joint fund, and if paid for at the time, they form no part of the debts that enter into competition with the joint creditors, although the payment of their price may have lessened the separate estate *pro tanto.* Indeed the same remark is applicable to all articles purchased on separate account, whether for consumption or not: these, though they may in some instances lessen the separate estate, their own appropriate fund, yet cannot, in the usual course, diminish the fund of the *joint creditors,* which alone could give them an equitable right to come on a fund thus increased at their expense. The claim of each class is, therefore, equally meritorious, both as to the motives for giving credit, and as to creating or increasing the respective funds, out of which each is to be satisfied: if then the policy of trade requires that the joint fund shall be appropriated, in the first instance, to payment of the joint debts, justice, equity, and conscience, on the other hand, without interfering with that policy, demand that the separate creditors should, at least, have the miserable advantage of the same priority as regards the separate

estate. It is unconscionable, that one class should have the exclusive benefit of one fund, and come in concurrently on the other, when both equally trusted to all the insolvent's estate, whether joint or separate, and when there is no reason peculiarly applicable to either, to presume the credit given by the one, had a tendency to create or increase the fund appropriated to the other. In *Woddrop* v. *Ward executor of Price,* 3 Desaus. Cha. Rep. 203, where every thing peculiar to bankruptcy was out of the question, the rule was adopted in a case which cannot be distinguished in principle, from the present.

The rule just proposed by the Chief Justice, is certanly more consonant with equity, than that which would let in the joint creditors without any restriction or limitation whatever, but I object to it, because it wants reciprocity. Suppose the separate creditors to have got twenty-five per cent. from the separate estate: will they be permitted to come on the joint estate *pari passu* with the joint creditors, after the latter have drawn from it in the same proportion? It is evident therefore the rule would operate unequally, by making the separate creditors share their fund with the joint creditors, where it happens to be the largest, without subjecting the latter to share theirs under the like circumstances. It may be said, it is impossible to put them on a footing in this respect, I grant it cannot be done on any plan of participating in the same fund: but you precisely put them on a footing by making each fund bear the burthen of its own debts; and if that of the separate creditors should happen to be the most productive, I know not on what principle of equity they can be deprived of the advantage.

But it is said, the rule is controlled by our statute of distribution, which settles the priority of the different *grades of debts*, without making any distinction between the different *classes of creditors* whose debts are of the same grade, and that of course *all* debts of the same grade must come in on an equality. If that be so, it is an

effect the legislature never intended to produce. They had nothing more in view than the administration of a *single fund* among *its own peculiar creditors.* The first was a matter easily subjected to a set of simple rules; but the second could not be touched by a hand so violent, without throwing the whole into inextricable confusion, and destroying all justice and equitable distinction. Here are two funds in the hands of the representative of an intestate who held them *in distinct characters.* As a surviving partner he was not, even at law, the *owner* of the partnership property in possession; and although as to *choses in action* the *remedy* survived to him, still to a share of these also, the representative of his deceased partner was entitled, so soon as they were reduced to possession. The rule allowing a set-off by a surviving partner of a partnership demand against a separate debt, and *vice versa,* which appears in contradiction to this doctrine, arises from technical principles of joinder of different matters in the same declaration; and is an anomaly in the law. If, on the death of a surviving partner, the partnership fund is to be blended with his private estate, it must be so in every instance, and to every purpose, as well in favour of, as against the separate creditors. Then, in case the separate estate were insolvent, the separate creditors would come in to the prejudice, not only of joint creditors, but of the representatives and creditors of the deceased partners, also, who would be burthened with the surviving partner's debts in every case of a deficiency. It is impossible to say the two funds shall be blended, when it is the interest of the joint creditors to have them so, and kept separate when circumstances render it otherwise. The argument is founded on the notion, that the surviving partner becomes the entire owner of the partnership fund and effects, and is only personally responsible to the joint creditors, and representatives of his deceased partners; which is wholly fallacious: for if he be like to waste the stock, chancery will restrain him from disposing of it, or receiving the

outstanding debts. *Hartz* v. *Schreder,* 8 Ves. jun. 317. The legislature never could intend to subject the property of a surviving partner, whether owned in his own right, or in a representative capacity, to the same process in a course of administration: nor could it be intended that the death of a partner should effect a total change in the rights of all parties, whether partners or creditors. I am therefore of opinion that each estate is liable to its own debts in the first instance, and to the creditors of the other, for the surplus, if there be any.[3]

[Each of the three members of the Court having a different opinion as to the proper distribution, the assets were distributed in accordance with opinion of Tilghman, C. J.][4]

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[3] The opinion of Duncan, J., is omitted. He took the position that the rights at law and under bankruptcy are different, and that the joint creditors should share equally with the separate creditors on the separate assets. *Compare: Blair* v. *Black, infra,* p.

[4] *Compare: M'Culloh* v. *Dashiell,* 1 Md. 96, 1827. (Archer, J.: "It is difficult to say upon what the rule in equity and in bankruptcy, with the modification above stated, is founded. [The rule that firm creditors have priority on firm assets, and separate creditors on separate assets, except where there are no firm assets and no solvent partner.] The joint estate is benefited to the extent of every credit which is given to the firm, and so is the separate estate in the same manner enlarged by the debt it may create with any individual, and there would be unquestionably a clear equity in confining the creditors to each estate respectively, which has thus been benefited by their transactions. So far the rule is sensible and intelligible; and although at law the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered both joint and several, without the possibility of the interposition of any restraining power of a court of equity; yet when, by the death of one of the parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, a court of equity will give to the separate creditors all the advantages thus by accident thrown upon them, and will not, by adopting the rigorous rule of the law merchant, thereby injure and prejudice the separate creditor, upon whom, viewed in connexion with the separate fund, it always looks upon as meritorious and entitled in the distribution of assets to the preference. But although a court of equity, as against the separate creditors, will not adopt the law merchant, which considers the contract both joint and several; yet whatever doubts have heretofore been entertained on the subject, where the claims of these joint creditors do not come into conflict with the separate creditors, but only with the interests of the representatives of the deceased partner, it is now undeniably settled, that equity will, as against such representatives, decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several.

"But although these distinctions are built on the solid foundations of reason and justice, it is not altogether so easy to perceive, why, when there is no joint fund, and *no* solvent partner, (by no solvent partner is meant bankrupt partner,) the joint creditor should thereby acquire the equitable right of coming in with the separate creditors *pari passu,* upon a fund in no manner benefited by the creation of his debt. Such, however, is the settled and established rule, as we are enabled to collect it both in bankruptcy and in equity; and according to this rule the complainant could not, in this case, be permitted to seek indemnity for his claim, from the separate estate *pari passu* with separate creditors, as it is a conceded fact in the cause, that there are joint funds, although very inconsiderable, and greatly insufficient to pay the debt of the complainant.

"But were not this the fact, this court would have no difficulty in saying, that the complainant should be postponed to the separate creditors; and that whether there was any joint estate or not, he should not be permitted to divide with the separate creditors a fund insufficient to pay them. We are, therefore, disposed to adopt the ancient rule as more consonant to equity and justice, that the joint creditors can only look to the surplus, after the payment of the separate debts; and on the other hand, that the separate creditors can only seek indemnity from the surplus of the joint fund after the satisfaction of the joint creditors.")

BLAIR *v.* BLACK.

IN THE SUPREME COURT OF SOUTH CAROLINA, 1899.

31 *South Carolina Reports*, 346.[1]

The opinion of the Court was delivered by

MR. JUSTICE MCGOWAN: On January 29, 1889, James W. Black and Jacob K. Carpenter, of the old mercantile firm of Black & Carpenter, and also of its successor, Black, Carpenter & Davies, made an assignment of both their individual and partnership property, for the payment of their debts, to John G. Black as assignee and trustee. J. L. Davies, one of the latter firm, did not sign the original deed of assignment, being absent at the time it was executed, but ratified it some days later, and, indeed, executed another deed, conforming substantially to the first. The assignment provided that the property and assets of the individual members of the respective firms should be first applied to the payment of the individual debts of the members of the firm; and that the property and assets of the firms respectively should be first applied to the debts of the partnership; and that if a surplus should remain after paying the debts of the one class, then such surplus should be paid to debts of the other class, and so reciprocally of the other class. The assignment also provided, that if there should not be sufficient funds to pay the debts, the assignee should pay them ratably, or such as should, within thirty days from the date of the assignment, agree to accept the terms of it, and to release the parties from all liability on their debts and claims, &c.

The cases stated above were instituted by creditors of the respective firms for the purpose of setting aside the deed of assignment, and, being identical in object and purpose,

[1] The opinion of Judge Kershaw in the lower Court is omitted. Judge Kershaw took the position that the separate creditors should have priority on the separate assets.

were consolidated and heard together. Several grounds were urged, sufficient, as alleged, to set aside the assignment and subject the property to the claim of creditors according to law, but, from the view which the court takes, it will not be necessary to consider any of the objections, except the one chiefly relied on by the assailing creditors, viz., that, in violation of section 2014 of the General Statutes, which denounces assignments giving preferences as "absolutely void," this assignment gives undue and illegal preference to individual over copartnership creditors, in excluding the partnership creditors (after exhausting the partnership assets) from coming in and participating with the individual creditors in the individual property of the members of the different firms; the proposition relied on being, that, under the law of this State, the individual creditors are not entitled to be paid first out of the individual property, but have only an equity to require that the partnership creditors should exhaust the assets of the firm, and after that is applied, they are entitled, as to any balance due them, to share equally and ratably with the individual creditors in the individual assets. While, on the other hand, in support of the assignment, it is urged that the rule is, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and, as to that, possess a like preference; and the surplus only, after satisfying such priorities, can be reached by the other class of creditors. So that really the only question involved is one purely of law. What was the law of this State upon the subject when the assignment was executed?[2]

The question is certainly an important one, which in the affairs of business life may arise daily, and it should be, if it has not already been, clearly and fully settled, so that all may know what the law is to which their actions should

[2] That part of the opinion in which he refers to the decision of Judge Kershaw, *see* note 2, *supra,* is omitted.

be conformed. It is true that there has been much discussion, and some difference of opinion, on the subject involved, not, as is seems to us, arising so much from the inherent difficulty of the subject, as from an artificial rule originally adopted in the English Bankrupt Courts mainly, as it would seem, on account of its simplicity and convenience of application, viz., that partnership creditors are entitled to partnership property, and, *e converso,* individual creditors are entitled to individual property, a rule of which Judge Story says: "It is not too much to say that it rests on a foundation as questionable and unsatisfactory as any rule in the whole system of our jurisprudence." *Story Part,* 577.

As we understand it, no rule upon the subject has ever been declared by positive statute, either in England or America; but whatever rule there may be has grown up entirely from the dicta of elementary writers and adjudications of the courts, supposed to be founded on some principle. But so far as concerns this "rule of reciprocity," as it is sometimes called, it does not seem to us to have been based upon any principle or general equities of the parties. All agree that the partnership creditors have an equity to exhaust the partnership assets, for the double reason that they have two funds, and the individual members have no interest until the partnership is settled. But the same cannot be said of the individual creditors. They are not creditors of the firm at all, but only of their individual debtor, whose individual property, including his clear share of the firm, is liable for all his debts alike, both partnership and individual. It strikes us that there is nothing in the relations or the equities of the respective classes to authorize or justify the application of the convenient *Procrustean* rule of "reciprocity."

But it is argued that the Circuit decree is in conformity with the English rule, and we should follow it without regard to its reason or equity, and disregard our own cases which have made a departure from it, for the sole reason that it was error to make that departure, and it should be

corrected by returning to the rule. Without going back to ascertain what is the precise rule adopted in the English Courts of Bankruptcy and Chancery, it is quite clear that as far back as the case of *Wardlaw* v. *Gray* (1837), cited . . the Circuit decree, the doctrine was announced in this State "that a partnership creditor has the right to resort either to the partnership property or to the separate property of the parties; but as a party having two funds, he may be compelled by the separate creditors of one of the partners to exhaust the partnership property before he proceeds against that of an individual partner," &c. Whether this decision did or did not run counter to what is said to be the English rule upon the subject, it is quite as clear that it has never been expressly overruled; but, on the contrary, has been recognized and followed, and at the time of the execution of the assignment under consideration was, as we think, the law of the State. In *Gowan* v. *Tunno et al.,* Rich. Eq. Cases, 369 (1832), it was held that "though partnership effects should be first applied to partnership debts, yet after these are exhausted a judgment against the partners as such binds the separate estate of each partner from its date."

In *Fleming* v. *Billings* & *Belk* (1856), 9 Rich. Eq., 149, it was held that "copartnership creditors are first to be paid out of the copartnership fund, and if that prove insufficient, then they are to come in with the private creditors (respect being had to liens) as against the individual property of the copartners." In *Gadsden* v. *Carson et al.,* 9 Rich. Eq., 252 (1857), it was held that "the individual creditors of a partner have not such exclusive right to be paid out of his individual property as to render fradulent an assignment of it for the benefit of the creditors of the firm. Partnership creditors having two funds to which they can resort, and individual creditors of the partners having but one—the private property of the debtor (including any balance which may remain to him from the firm, after its affairs are settled)—such individual creditors have an equity to compel the partnership creditors to resort first to the partnership

assets; but after they are exhausted, the partnership creditors have as good right to be paid out of the private property of a partner as his individual creditors," &c. In this case Chancellor Johnston remarked that it "was in conformity to *Wardlaw* v. *Gray,* with which we see no reason to be dissatisfied."

In *Wilson* v. *McConnell,* 9 Rich. Eq., 500 (1857), it was held that "where a copartner, having a separate estate, dies, the copartnership creditors have the right first to exhaust the copartnership estate, and if that proves insufficient to pay their demands, then they are to be paid from the separate estate of the copartners *pro rata* with his separate creditors." In *Adickes* v. *Lowry,* 15 S. C., 128 (1880), it is true that an intimation is given that the question might be still open, but that was not intended to decide anything. The remark was: "But even if this were so, there would still remain the very important and interesting question, whether the separate creditors of Bratton would not have in equity a preference over the partnership creditors to the separate assets of Bratton, &c. But inasmuch as this question was not raised in the court below, and has not been argued here, we do not propose to enter upon its consideration now," &c.

In *Hutzler Bros.* v. *Phillips,* 26 S. C., 136 (1886), it was held "that partnership creditors, after exhausing partnership assets, are entitled to share the separate property of the partners *pro rata* with unsecured individual creditors." The Chief Justice reviewed all the authorities, saying, among other things: "We think the true doctrine is as stated by the Circuit Judge with respect to the right of the separate creditors, if any equity exists in his behalf, such as two funds, * * * to throw the copartnership creditors on the partnership assets in the first instance, but after the partnership assets have been fully and fairly exhausted, to come in *pro rata* with the separate creditor. This seems to be the weight of authority with us. Besides, a debt contracted by a copartnership is not only a debt of the firm,

but a debt, in substance, of each individual member of the firm, and the property of the firm and of each member is liable for it. But the property of the firm is not liable for the separate debt of a member; only the interest of a member is liable, which is nothing until the firm debts are paid," &c.

We think this case finally settled the law in this State. But, as if to put the matter beyond all dispute, the very last work upon the subject of partnership, published this year (1889), expressly approves and cites from this case, as containing the proper exposition of the law upon the subject, both on principle and authority. The author says: "The insolvent, by his inability to meet his liabilities, is not the less, but all the more, a debtor. He owes to his creditors not the property itself, nor any other asset, but merely the price of the property. The debt is personal, without any lien or preference for its payment out of the debtor's estate. The individual partner is, however, not less liable for a firm debt than is the firm itself. The several liability of the partners is no less a constituent of the partnership obligation than is their joint obligation. Both spring from the root of partnership. The joint creditors, therefore, are entitled at law to share the separate estate of a partner with his individual creditors," &c. See Parsons on *"Principles of Partnership,"* section 108, citing *Hutzler Bros.* v. *Phillips,* and other cases.

We have not the least idea that the parties intended to do anything wrong, but the assignment was not in conformity with the law as we understand it, and had the effect of creating preferences not allowed by law.

The judgment of this Court is, that the judgment of the Circuit Court be reversed, and the cases remanded to the Circuit Court for such further proceedings as the parties may be advised, in accordance with the conclusions herein announced.[3]

[3] *Note* the following statement by Judge Lowell, in *In re* Wilcox, 94 Fed. 84, 1899, p. 102: "The general rule [that firm creditors have priority on firm assets, and separate creditors on separate assets] has

been followed or recognized in Mississippi (*Oakey* v. *Rabb's Ex'rs*, Freem. Ch. 546; *Irby* v. *Graham*, 46 Miss. 425 430, 432); in Nebraska (*Bowen* v. *Billings*, 13 Neb. 439, 443, 14 N. W. 152); in Iowa (*Hubbard* v. *Curtis*, 8 Iowa, 1; *Miller* v. *Clarke*, 37 Iowa, 325); in Minnesota (*Ives* v. *Mahoney*, 73 N. W. 720); in Tennessee (*Fowlkes* v. *Bowers' Heirs*, 11 Lea, 144). In none of these states has there been found a case which deals with the exception in the absence of joint estate. Both the rule and the exception have been recognized in Alabama (*Smith* v. *Mallory's Ex'r*, 24 Ala. 628; *Van Wagner* v. *Chapman's Adm'r*, 29 Ala. 172; *Evans* v. *Winston*, 74 Ala. 349); in New Jersey (*Davis* v. *Howell*, 33 N. J. Eq. 72); in Illinois (*Rainey* v. *Nance*, 54 Ill. 29; *Young* v. *Clapp*, 147 Ill. 176, 32 N. E. 187, and 35 N. E. 372; *Ladd* v. *Griswold*, 4 Gilman, 25, 39); in Missouri (*Level* v. *Farris*, 24 Mo. App. 445; *Hundley* v. *Farris*, 103 Mo. 78, 15 S. W. 312); in Rhode Island (*Colwell* v. *Bank*, 16 R. I. 288, 290, 15 Atl. 80, and 17 Atl. 913; *Pearce* v. *Cooke*, 13 R. I. 184); in Wisconsin (*Thayer* v. *Humphrey*, 91 Wis. 276, 64 N. W. 1007); in Maine (*Harris* v. *Peabody*, 73 Me. 262). The exception has been somewhat doubtfully recognized in Georgia (*Toombs* v. *Hill*, 28 Ga. 371; *Keese* v. *Coleman*, 72 Ga. 658). The rule has been recognized, and the exception disapproved, in Indiana (*Weyer* v. *Thornburgh*, 15 Ind. 124; *Warren* v. *Able*, 91 Ind. 107; *Warren* v. *Farmer*, 100 Ind. 593), and in Massachusets (*Potters Works* v. *Minot*, 10 Cush. 592). In New Hampshire the rule has been recognized, and the exception declared to be unreasonable, though it is established in bankruptcy. If there be no preference where there is no joint estate, it is said by the court that there should be no preference where there is no separate estate. *Weaver* v. *Weaver*, 46 N. H. 188, 192. In Ohio the rule was disapproved in principle, though admitted to be established in bankruptcy, in *Grosvener* v. *Austin's Adm'rs*, 6 Ohio 104. In *Rodgers* v. *Meranda*, 7 Ohio St. 179, both the rule and the exception were approved. In *Brock* v. *Bateman*, 25 Ohio St. 609, where the joint estate was not sufficient to pay the costs, the exception was allowed to operate, and, in the confusion of mind caused by an attempt to reconcile the theory of the exception with the theory of the rule, the court declined to say what would happen where the partnership assets would yield to the joint creditors less than the separate assets would yield to the separate creditors. Plainly, the court was inclined to reduce the rule to a mere marshaling of assets. In Kentucky it appears to be established that the joint creditor may waive his right to proceed against the joint estate, and, if he does so, may share equally with the separate creditor in both joint and separate estate; otherwise, the separate creditor receives from the separate estate as large a dividend as the joint creditor has received from the joint estate, and thereafter joint and separate creditors are paid *pro rata* from the separate estate. *Bank* v. *Keizer*, 2 Duv. 169. The general rule has been disapproved in Vermont. The numerous exceptions ingrafted thereon, it is said, show that the rule rests on no satisfactory basis. *Bardwell* v. *Perry*, 19 Vt. 292. It has been disapproved in Connecticut (*Camp* v. *Grant*, 21 Conn. 41), and in Virginia (*Pettyjohn* v. *Woodroof*, 10 S. E. 715). In Kansas the matter seems to be left in some doubt. *Fullum* v. *Abrahams*, 29 Kan. 725. The list above given is not supposed to be exhaustive, but it represents with some fulness the rule of distribution as administered in the courts of equity of the several states. It should be added that some of the decisions above cited rest upon the language of particular statutes, as well as upon general principles of law."

In *Black's App.*, 44 Pa. 503, 1863, the Supreme Court of Pennsylvania, on a bill in equity, approved the rule, expressly pointing out that the exception, permitting the joint creditors to come in *pari passu* with the separate creditors on the separate assets where there was no joint estate and no solvent partner, was not before them. *See* p. 507.

BANKRUPT ACT OF 1898.

Chapter III, Section 5, Partners.

a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the Court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and se-

cure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.[1]

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[1] *The following propositions have been taken from Collier on Bankruptcy. The references are to the pages of the ninth edition, where the student will find a full citation of authorities.*

1. A partnership is in bankruptcy a legal entity. Page 115.

2. A partnership may be adjudged bankrupt, although the partners who compose it are not so adjudicated. Page 116.

3. The firm must petition or be petitioned against; if the latter, the firm, or a member of it acting within the scope of the partnership, must have committed an act of bankruptcy, and if adjudication follows, the firm, *eo nomine,* must be adjudicated. Page 116.

4. In determining the question of insolvency, the individual property of the partners should be considered, and where the assets of a partnership, together with the individual properties of each partner, exceed their liabilities the partnership is not insolvent. Page 119.

5. If all the partners petition voluntarily, the proceeding prior to adjudication is identical with an individual petition. If the petition be involuntary, and insolvency is necessary to the act, it must appear affirmatively that both the partnership as an entity and the individuals composing it were and are insolvent. Page 122.

6. It has been held, following the entity doctrine, that where the partners petition, separate petitions must be filed by the firm and by the individuals. T' better opinion is, however, to the contrary, viz, that but one petition need be filed. Page 122.

7. If the adjudication is of the firm only, the discharge following it will be a bar only to firm debts. If the application is for individual bankruptcies only the discharge will not affect firm liabilities. Page 125.

8. Where there are no firm assets and the firm creditors are duly scheduled and receive notice, there is a conflict of authority as to whether the individual discharge of a bankrupt partner should operate as a discharge of the bankrupt from the partnership debts. Pages 126, 127.

The apparent contradiction between some of the foregoing propositions is evidently in part due to the partial adoption of the entity theory of a partnership by the Act of 1898. On this point, *see* the following language of Lowell, J., *In re Forbes,* 11 Am. B. R. 787, p. 789: "For some purposes a partnership has been treated as an entity apart from the partners; for other purposes it has been treated as a congeries of partners. Some courts have suggested that the Act of 1898 has adopted for bankruptcy the theory of an entity separate from

the partners. Section 1 (19), 5a; *In re Meyer,* 3 Am. B. R. 559, 98 Fed. 976; *In re Mercur,* 11 Am. B. R. 505, 122 Fed. 384. Yet this treatment of a partnership is irreconcilable with other provisions of the statute. Section 5h of the act provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt. This is, in effect, a provision that the partnership shall not be made bankrupt except by an adjudication of all its partners. Adjudication without accompanying distribution of the bankrupt estate would be worse than a vain form, for it would confuse inextricably questions of preference, lien, attachment, and the like. The remedy given by clause 'h' to the trustee is, in substance, the equitable remedy found so unsatisfactory in the days of Lord Eldon. *See In re Wilcox* (D. C.), 2 Am. B. R. 117, 94 Fed. 84, 95. The negative provision of clause 'h' is more definite than the affirmative provision of clause 'a,' which does not declare under what circumstances the adjudication of a partnership shall be made, or what shall be its form or effect. Section 5b contemplates that the adjudication under a joint petition shall be both joint and several. If the adjudication were joint only, there would be no object in providing that the joint creditors alone shall elect the trustee. Still again, section 5c gives to the court which has jurisdiction of one partner 'jurisdiction of all the partners,' and says nothing about jurisdiction of the partnership as an entity. Read as a whole, Form 2 [the official form prescribed by the Supreme Court of the United States for the voluntary partnership petition] agrees with section 5h, and not with the theory of entity. It is in terms the petition of individuals. It sets out that 'they' owe debts which 'they' cannot pay and that 'they' desire the benefits of the Bankrupt Act. The joint debts are styled 'the debts of said partners,' not the debts of the firm, and the joint assets 'the property, real and personal, of the said partners.' It is true that the last paragraph of the petition contains a prayer that 'the firm may be adjudged by a decree of the court to be bankrupts,' but the use of the plural shows that the word 'firm' is there a collective noun, as further appears from the fact that the prayer is obviously intended to cover a separate as well as a joint adjudication.

"But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as *In re Dunnigan* [D. C.] 2 Am. B. R. 628, 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estates of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy. Bankruptcy without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all its partners. *See Vaccaro* v. *Bank of Memphis,* 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279; *In re Blair* (D. C.), 3 Am. B. R. 568, 99 Fed. 76; *Davis* v. *Stevens* (D. C.), 4 Am. Br. R. 763, 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and the analogy of Form No 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceedings is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the

effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not s' ong. *See In re Mercur,* 11 Am. B. R. 505, 122 Fed. 384, 58 C. C. A. 472."

As to whether an adjudication of all the partners upon separate petitions carries with it an administration of the partnership estate see the opinion of Sulzberger, J., *Iron Company* v. *Mercur,* 30 Pa. C. C. 406, 1904. (A and B, partners, made a voluntary assignment for benefit of creditors. Subsequently each separately were adjudicated bankrupt and received their discharges. *Held,* in a subsequent suit against the partnership, that these discharges could not be set up as a defence.)

In re WILCOX.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, 1899.

94 *Federal Reporter*, 84.

IN Bankruptcy. On review of ruling of referee.

The certificate of the referee (Henry J. Field, referee in bankruptcy for Franklin County, Mass.) was as follows: "The bankrupt, three or four years ago, was a member of a partnership at Lincoln, Nebraska. The other member of the firm left, with all the funds; and she set herself about to pay up the partnership debts, in which she succeeded so far as to pay all of them except the one in question, amounting to $1,000, besides accrued interest, which was presented for proof against her individual estate in bankruptcy, and allowed. Upon the question whether such creditor of a former partnership should share *pro rata* with the individual creditors, I ruled that as no evidence appeared showing that there are any assets of said partnership, and there was some evidence that there are none, under the law such creditor is entitled to share with the individual creditors; that is, *pro rata*."

The case was submitted to the judge without argument.

LOWELL, District Judge: Thus far the history of the development in this country of the rule of distribution has been considered apart from the bankrupt acts.[1] The explicit provisions of these acts and their construction by the courts remain to be dealt with. The bankrupt act of 1800 (2 Stat. 19), contained no reference to the distribution of the assets of a partnership and its component partners, and, except

[1] The editors omit, on account of its great length, the first part of the opinion of Judge Lowell with regret. It is an invaluable monograph on the history both in England and America of the rule of the distribution in bankruptcy and equity of partnership and individual assets. The editors have received great assistance from it in the work of arranging the preceding cases and notes in this chapter.

Tucker v. *Oxley,* no decision made under that act has been found which bears upon the question. Act 1841, Section 14 (5 Stat. 448), reads in part as follows:

"The assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and, if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts."

This provision, it will be seen, recognizes the general rule of distribution, and says nothing about any exception thereto. *In re* Marwick (1845), 2 Ware, 229, Fed. Cas. No. 9, 181, there was no joint fund except $40, paid by a separate creditor for a worthless asset in order to create a nominal joint estate, and so to prevent the joint creditors from coming upon the separate estate. Judge Ware said: "It has hitherto been found impracticable to establish any general rule that will meet the equities of all the various cases that come up in practice; and the courts have been finally compelled, instead of subjecting the whole to a rigorous analysis, and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first

seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular equities of particular cases. This system is admitted to be not entirely satisfactory. It has sometimes been departed from, and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has been hitherto presented as a substitute which is not found to be encountered by equal difficulties." 2 Ware, 233, Fed. Cas. No. 9, 181.

After saying that the general rule is based upon the theory of credit given to the different estates, the learned judge continued: "The general rule therefore has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now, admitting the case of there being no joint estate to be a *casus omissus,* not contemplated, and therefore not within the purview of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes that, when the statute covers the whole case in all its circumstances, and makes no exceptions, none can be made by the court." 2 Ware, 235, Fed. Cas. No. 9,181.

It will be perceived that the learned judge approved the general rule, disapproved the exception on principle, doubtfully recognized it upon authority, and avoided its effect by permitting its flagrant evasion.

Act 1867, section 36 (Rev. St. Section 5121), is, in all essentials, the same as section 14 of the act of 1841. *In re* Downing (1870) Fed. Cas. No. 4,044, Judges Dillon and Krekel held that the provision for distribution made by the act of 1867 did not apply where the commission was separate. The decision was rested largely upon section 27 of the act of 1867 (Rev. St. section 5091), which provides that "all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate *pro rata,* without any priority or preference whatever" (with

certain immaterial exceptions). *In re* Knight (1871) 2 Biss. 518, Fed. Cas. No. 7,880, Judge Drummond seems to have followed *In re* Downing, though it is a little hard to say whether he meant to declare that, under a separate commission, joint creditors could come ratably with the separate creditors upon the separate estate, even where there was joint estate (as would be the case if Rev. St. section 5121, and the general rule had no application to a seperate commission), or meant to let them come upon the separate estate only where there was no joint estate. See *In re* Goedde, 6 N. B. R. 295, Fed. Cas. No. 5,500.

In re Pease, 13 N. B. R. 168, Fed. Cas. No. 10,881, Judge Nelson, of Minnesota, held that Rev. St. section 5121, was wholly inapplicable in the case of a separate commission, saying: "We thus have a firm dissolved, no assets, and all the partners insolvent and in bankruptcy, without any voluntary or *invitum* proceedings being instituted to declare them bankrupt as a firm. Under such circumstances, in my opinion, the individual creditors of Pease have no prior rights to the creditors of the old firm of which he was a member. Their claims have been duly proved, and they are entitled to share *pro rata* with the other creditors. The equity rule in regard to the rights of firm and individual creditors does not apply, for the reason that no proceedings have been instituted against the partnership under section 5121 of the Revised Statutes."

In re Lloyd (1884), 22 Fed. 88, Judge Atchison apparently agreed with *In re* Knight, though the decision went upon another question. See, also, *U. S.* v. *Lewis,* 13 N. B. R. 33, Fed. Cas. No. 15,595. These decisions are a return —apparently quite unconscious—to the bankruptcy practice of Lord Thurlow, and to his distinction between joint and separate commissions, but apparently without that remedial intervention of equity which, under Lord Thurlow, made the exception in bankruptcy practically inoperative.

In re Jewett (1868), Fed. Cas. No. 7,304, Judge Drummond confirmed the decision of the register, which held that

the exception in the absence of joint assets was applicable under the statute. *In re* Slocum, Fed. Cas. Nos. 12,950, 12,951, Judge Wheeler, and, upon appeal, Judge Blatchford, held that the exception in the absence of joint estate was applicable under the statute of 1867; and this even where there were joint assets insufficient to pay the expense of realizing them. No reasons were given. *In re* Litchfield. 5 Fed. 47, Judge Choate followed *In re* Slocum, and he expressly differed from *In re* Knight in holding that section 5121 applied to separate, as well as to joint, commissions. *In re* Blumer, 12 Fed. 489, Judge Butler held that, where there were joint assets collected which might have been divided, though they were afterward spent in the vain attempt to realize other assets, the exception did not apply. Judge McKennan concurred in the opinion. *In re* Byrne (1868), 1 N. B. R. 464, Fed. Cas. No. 2,270, Judge McCandless affirmed the decision of a register which held that the exception in the absence of joint estate was not applicable under the act of 1867. *In re* Johnson, 2 Low. 129, Fed. Cas. No. 7,369, Judge Lowell intimated in his opinion that the exception was not applicable, but that point was not involved in the decision. See *In re* McLean, 15 N. B. R. 333, 337, Fed. Cas. No. 8,879.

The act of 1898 differs materially from the acts of 1841 and 1867. * * * Following *In re* Knight, it may be urged that the provisions of section 5, cl. f, apply only where a joint commission has been taken out, and that they are, therefore, inapplicable to the case at bar. But, if this be the true construction, then, under any separate commission, whether there be joint estate or not, the joint creditor will be allowed to take dividends from the separate estate ratably with the separate creditors. If this be the law, joint creditors will commonly take out separate commissions, as was pointed out by Lord Loughborough in *Ex parte* Elton. Lord Thurlow's rule, viz. that of paying all creditors ratably under a separate commission, did not prove so satisfactory even when it was tem-

pered by the equitable remedies which he administered, that it should be readopted without those remedies. I hold, therefore, that section 5, cl. f, of the bankrupt act applies the rule of distribution to separate as well as to joint commissions, either directly or by analogy. See *In re* Litchfield, 5 Fed. 47.

Considering the plain language of the bankrupt act, which recognizes no exceptions to the general rule, the history of the exception in the absence of joint estate, the discredit and misconception which that exception has brought upon the general rule both in England and this country, the fantastic subexceptions imposed upon the exception, and the language used by the Supreme Court in *Murrill* v. *Neill,* I think that I am justified in holding that the exception is inapplicable under the present bankrupt act. If the language and decisions of some wise and learned judges are thereby disregarded, yet it has been shown that most, if not all, of those judges acted under a misapprehension of the history of the law. It is further to be noticed that section 5, cl. g. has, by permitting the joint estate to prove against the separate estate and *vice versa,* resolved a doubt which arose under the English law, and has enabled a Court in banruptcy to secure generally the equitable distribution of the property of the several estates. Section 5, cl. h, provides expressly for the settlement of the partnership affairs where one partner has been adjudged a bankrupt under a separate commission by directing the remaining partners to settle the partnership business; that is to say, to pay the joint debts. This provision removes, at least in part, the difficulty pointed out by Lord Eldon in the application of the general rule to a separate commission. The decision of the referee is reversed, and the petitioning creditor is not to receive a dividend until the separate debts have been paid in full.[2]

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[2] Judge Lowell's construction of the Bankrupt Act has been concurred in by the Circuit Court of Appeals of the Second Circuit. *In re Janes,* 133 Fed. 912, 1904, and by the Circuit Court of Appeals of the Fourth Circuit, *Euclid Nat. Bk.* v. *Union Trust and Deposit Co.,* 149 Fed. 975, 1906, *but see* the action of the Circuit Court of Appeals for

the Third Circuit, in *Conrader* v. *Cohen,* 121 Fed. 801, 1903, where Judge Acheson, speaking for the Court, said: "That where there are no partnership assets and no solvent partner, the firm creditors share in the separate estate of the bankrupt partner *pari passu* with the individual creditors, was the recognized rule under the Bankrupt Act of 1807 (14 Stat. 517); *In re Downing,* 7 Fed. Cas. No. 4,044; *In re Knight,* 14 Fed. Cas. No. 7,880; *In re Pease,* 13 N. B. R. 168, Fed. Cas. No. 10,881. Here we cannot do better than quote what was said by Circuit Judge Dillon in *Re Downing, supra:*

"'Section 36 of the Bankruptcy Act only comes into operation when there are firm assets, and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshaled according to the equity rule; firm creditors to have priority as respects the joint assets, and individual creditors as respects the separate assets of their debtor. This construction of the Bankruptcy Act has the merit of producing that equality which it is the leading and manifest purpose of the act to secure, and, in effect, reaches the result which the English chancellors have felt bound by equitable principles to adopt, viz., that where there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share *pari passu* in the estate of the bankrupt partner.'

"We discover no material difference between the provisions of the Bankruptcy Act of 1867 and those of the act of 1898 touching the question under consideration. In this regard, section 36, of the former act (14 Stat. 534) and subdivisions 'd,' 'f', and 'g' of section 5 of the latter act (30 Stat. 547, 548 [U. S. Comp. St. 1901, p. 3424]), are in substantial agreement." The opinion does not refer to the case of *in re* Wilcox.

Collier, in his work on Bankruptcy (edition of 1909), p. 132, says: "It is to be hoped that it [Judge Lowell's opinion] has sounded the knell of all exceptions to the broad rule that joint creditors share in joint assets and individual creditors in individual assets."

Ex Parte PLUMMER.

In the High Court of Chancery, Before Lord Cottenham, 1841.

1 *Phillips Reports,* 56.

This was an appeal, in the form of a special case, from the Court of Review.

The material facts, as stated in the case, were, that previously to the issuing of the commission, the bankrupts carried on business in partnership as West India merchants, in the course of which the firm became indebted to George Joad, in the sum of 2000*l.* for monies lent, and in the further sum of 5998*l* 13*s.* 4*d* for the freight of ships of which Joad was the owner. Being desirous of obtaining further advances, they assigned to Joad certain West India securities belonging to the firm, and entered into joint and several covenants for the payment of the 2000*l.* and any further sum or sums which Joad might afterwards advance to them; and about the same time they gave him a similar security for the payment of the 5998*l.* 13*s.* 4*d.,* and any further sums in which the firm might afterwards become indebted to him for freight, not exceeding 10,000*l.* The amount due from the firm of Joad, at the time of the bankruptcy, on the first-mentioned security was 10,014*l.* 7*s.* 5*d.,* and on the other security 10,742*l.* 4*s.* 5*d.,* in respect of which two debts he tendered a proof to the commissioners, for the gross sum of 20,014*l.* 7*s.* 5*d.,* against each of the separate estates of the bankrupts. The commissioners, however, disallowed the proof, and the judges of the Court of Review having, on two occasions, on which the case was subsequently brought before them, been divided in opinion, it was eventually arranged that an order should be made, allowing the proof, without prejudice to the securities, in order that the question

might be submitted, in the form of a special case, to the Lord Chancellor.[1]

The Lord Chancellor: This was a special case stated, under the act of parliament, by the Court of Review, for the opinion of this Court. [His Lordship then stated the facts, and proceeded as follows.] Upon these facts the question submitted to this Court is, whether George Joad, being a separate as well as joint creditor of the bankrupts, is entitled to prove his whole debt against their separate estates; or whether he is entitled to prove only for the balance which shall remain due to him after realising the security which he holds upon their joint estate.

Now what are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realising his security. For the principle of the bankrupt laws is, that all creditors are to be put on an aqual footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply: he is in that case entitled to prove for the whole amount of his debt, and also to realise the security, provided he does not altogether receive more than 20*s.* in the pound.

That is the ground on which the principle is established; it is unnecessary to cite authorities for it, as it is too clearly settled to be disputed; but I may mention *Ex parte* Bennett [2 Atk. 527.] *Ex parte* Parr [1 Rose, 76.] and *Ex parte* Goodman [3 Mad. 373.], in which it has been laid down.

The next point is this: In administration under bankruptcy, the joint estate and separate estate are considered as distinct estates: and accordingly it has been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That

[1] The Reporter's notes of the arguments of counsel are omitted.

was the principle upon which *Ex parte* Peacock proceeded, and that case was decided first by Sir J. Leach and afterwards by Lord Eldon, and has since been followed in *Ex parte* Bowden. [1 Dea. & Ch. 135.] Now this case is merely the converse of that, and the same principle applies to it.

On these grounds I am of opinion that the creditor is entitled to prove his whole debt, without giving up his security, that security being no part of the estate under administration; and therefore, that the order of the Court below was right; but as the point is one upon which the Judges of that Court have been divided in opinion, on two occasions on which it has been brought before them, I think it is not a case for costs on either side.[2]

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[2] The Bankrupt Act of 1898 provides, that a secured creditor's claim shall be allowed for the purpose of receiving a dividend "for such sums only as to the court seems to be owing over and above the value of their securities." (Section 57.) A secured creditor shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets." (Section 1 (23).)

In The Matter of FARNUM.

In the District Court of the United States, for the District of Massachusetts, 1843.

6 Boston Law Reporter, 21.[1]

Sprague, J.: Peter Farnum was a partner in five different firms. One of them consisted of Peter Farnum, Luther Wright, and Claudius B. Long, under the style of the Blackstone Woollen Company. All the members of that firm have, upon their own applications, been declared bankrupt. The Blackstone Bank hold a bill of exchange, drawn by the Blackstone Woollen Company and indorsed by Peter Farnum, and the question is, whether they can prove their debt both against the joint estate of the firm, and the separate estate of Farnum, or must be put to their election. There are many other creditors holding similar securities, and presenting the same question.

The English rule, it is admitted on all hands, excludes such double proof; and although it is not binding as authority here, yet, in a question concerning the rights and remedies on commercial paper, the rule adopted by able and enlightened judicial tribunals, in a country so highly commercial, would be adopted as a safe guide unless good reasons be presented for departing from it. The history of this rule is not a little singular. It commences with *Ex Parte* Rowlandson, (3 Peere Williams, 405), before Lord Talbot, in 1735, and ends with *Ex Parte* Moult, before Lord Brougham, in 1832, (Montague and Bligh's Rep. 28). The first case and those also of *Ex Parte* Parminter, in 1736, Abington *et als.* in 1737, and *Ex Parte* Bond and Hill, in 1743, (1 Atkins, 98), and *Ex Parte* Banks, (1 Atkins, 106), were all cases of joint and several bonds. In the first case, Lord

[1] The Reporter's statement of the facts of the case is omitted.

Talbot "at first inclined to think that the petitioner being a joint and separate creditor ought to be at liberty to come single satisfaction, but the next day his lordship held that at law when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly, and on the contrary if he sues them jointly he cannot sue them severally, but the one action may be pleaded in abatement of the other, so by the same reason the petitioner in the present case ought to be put to his election under which of the two commissions he would come." And on page 408 he expressly distinguishes it from a former case determined by Lord King in 1732, in which a creditor was allowed to prove against a firm, and also against one of the members on his separate bond for the same debt, and again relies on the rule at law which precludes a party from proceeding jointly and severally on the same bond at the same time.

In *Ex Parte* Moult, George Geddes was a member of two firms, one of which was the drawer and the other the acceptors of a bill of exchange; and the creditor claimed to prove against both estates. It was decided, that, although double remedies would exist at law, they shall not be allowed in bankruptcy; and this is in accordance with many preceding cases, all of which are there referred to and examined. *Ex Parte* Moult was much discussed, and a strong effort was made to overthrow the rule. It first came before the Court of Review (Montague's Cases in Bankruptcy, 321), and the four judges of that court were equally divided, two of them being opposed to the rule, as founded neither in law nor justice; and the Lord Chancellor finally decided solely on the ground that the rule, although arbitrary, having been acted upon for a length of time, had become the law of the court, whatever may have been its origin. Here we see, that the decision in *Ex Parte* Rowlandson, founded avowedly on the course of proceedings at law, which prevents a creditor maintaining a joint and several suit at the same time on the same bond, has led to the establishment of an arbitrary rule, confessedly in violation of law when

applied to double mercantile securities. It is not necessary to examine all the cases, and see by what steps this result has been reached—they will be found collected in *Ex Parte* Moult.

I have not been able to discover any sound principle upon which this result rests. Indeed, it has been generally admitted, even by those who have enforced the rule, that it is as little consonant with justice as with the rules of law. Lord Eldon, in *Ex Parte* Bevan (10 Ves. Jr. 107), says, "The principle seems obvious; yet in bankruptcy, for some reason not very intelligible, it has been said the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and several security, should not go against both estates." Mr. Eden, in his treatise on Bankruptcy, ch. 11, sec. 4, says, "This doctrine, by refusing a creditor the benefit of the caution he has used in obtaining a joint and several security, has been justly reprobated, and is founded upon no sound principle or analogy whatever." And this is repeated in the same language in the last edition of his work, published in 1832, under his title of Lord Henley, p. 181. Eminent counsel, who have been called upon to sustain the rule, have shrunk from defending it on principle. Mr. Wigram, in *Ex Parte* Moult, (Montague's Cases, p. 333), commences his argument by saying, "The rule is established by decision, and as the court has *always* treated it as a rule founded on convenience, and not upon principle, it must be considered as an arbitrary rule which this court is bound implicitly to follow." The Chief Judge in delivering his opinion against the double proof in the Court of Review, in *Ex Parte* Moult (Montague's Cases, p. 334), says, "it is not denied that the case urged by the respondents (for both proofs), is most in accordance with legal doctrines and rights; but it was said that the rule established by practice in bankruptcy is too firmly settled to be now shaken." And he does not attempt to defend the rule on principle. Sir A. Pell, in giving his opinion in the same case, p. 337, says: "Does the rule correspond with the law?

It is admitted it does not. Is it consonant with justice? It is almost admitted it is not. We are therefore called upon to give our assent to an arbitrary doctrine, not founded on law or justice." Again, p. 340, "I cannot, as a common lawyer, understand the principle of this arbitrary rule." Sir Edward Sugden, in his argument before the Lord Chancellor, in *Ex Parte* Moult (Montague and Bligh, p. 35), attempts to give the reason of the rule. He says, "Originally the rule might have seemed strange, because at law both estates, upon a joint and several security, might have been taken on execution. Why not so (it might have been argued) in bankruptcy? The reason is, that the fund of the debtor is no longer open to the diligence of the creditor. All litigation ceases, and the assets are to be distributed equitably among the creditors. The joint fund to those who have looked to it for security or satisfaction, and the separate to the creditors who have trusted the individual partner." The fund is no longer open to the diligence of the creditor. Be it so. But this creditor, while the race of diligence continued acquired rights to come on the joint estate by one contract, and on the separate estate by another, both of them valid, and why should either of these vested rights be taken away because the fund is not now open to future diligence? Further, it is said, "The *joint fund* is to be distributed to those who have looked to it for security, and the separate to the creditors who have trusted the individual partner."

This reason has also been strenuously urged at the bar in the present case, and it is insisted that the exclusion of the bank from both funds is a necessary corollary from the rule which appropriates the joint funds primarily to joint debts, and the separate funds to separate debts. But the answer is obvious. This creditor looked to the joint fund for security and satisfaction, and he also trusted the individual partner. Without two distinct contracts, giving him a right to come upon both funds he would never have parted with his property. If the joint fund is to pay joint debts, here is a joint debt. Can you exclude A? It is admitted that you cannot.

You must allow the creditor to come against the joint estate, if he so elects. Neither can you exclude him from the separate estate, if he elect against that. The joint creditors cannot say, you shall not participate with us, because you have a separate security; nor the separate creditors exclude him because he has a joint security. Then certainly neither class is wronged by his participating with them, and how are they injured by his participating also with the others? The reason is unsatisfactory, and if Sir Edward Sugden could not defend it on principle, we may well conclude that it is indefensible.

I think it apparent that Sir Edward Sugden was not himself entirely satisfied with the reasons for the rule, for he subsequently, page 36, says, "It is argued that all learned judges, and Sir S. Romilly disapproved of the rule which compels a creditor, having a joint and several security, to elect upon which of them he will prove, and to abandon the other. If, notwithstanding that strong expression of disapprobation, the rule exists, the expression of disapprobation confirms the rule. It is like the canon of descents, which excludes the half blood: the rule is disapproved, but it must prevail till altered by legislation. The rule, it is true, deprives a creditor of part of his common law right, if bankruptcy happen." It is urged by the learned counsel for the assignee, in the present case, that our bankrupt law was made with reference to the English rule, and renders it obligatory. Our statute departs so widely from the English that its constitutionality has been questioned on that ground. It established a system in most respects entirely new, and there is nothing in the statute to indicate that it was intended to render English decisions obligatory in its adminstraton. In England the rule excluding proof against the joint and separate estates has been long established. Existing contracts have been made under its operation, and with reference to it. In this country it is otherwise. Existing contracts have been made under, and with reference to, the rule of law which gives to a party holding two valid obligations

the benefit of both. This right, founded both in law and justice, I do not think myself bound or authorized to set aside on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognised in this country.

Where a dividend has been paid on one estate the amount thereof would be deducted, and a dividend only, on the balance allowed from the other. But here dividends on both estates are simultaneous, and the creditor is entitled to prove against both for the whole.[2]

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[2] *Compare: Fayette Nat. Bk.* v. *Kenney,* 79 Kty. 133, 1880. (A and B were partners. They gave notes to a certain bank, signing the same in the firm name and adding their own individual names. The firm and the partners became insolvent. A assigned to C for the benefit of creditors, and the firm also assigned to C for the same purpose. The bank presented its claim and received a dividend out of the firm assets. C filed a petition for the settlement of the trust, and the bank presented its claim for a dividend *pro rata* with the separate creditors of A. Pryor, J.: "There was certainly no lien created on the individual estate of Kenney by his signature to the notes, upon which distribution is sought, nor is it questioned that the parties had the right by contract to create liens that the chancellor could not impair or disregard, or strengthen their claims by having the name of a stranger to the firm as surety; but it is maintained that although Kenney is individually liable, because he is a member of the firm; still there is a legal right, or an equity, arising in favor of the partnership creditors in this case that would not have existed in the absence of Kenney's individual signature. It is conceded that a several and joint liability exists by reason of the firm signature, and that Kenney's individual estate could be subjected to the payment of the several debts, as well as his interest in the partnership; but having evinced a purpose to make himself individually liable, and appellants having accepted the notes with Kenney's individual signature to them, that such a liability might be created, it is urged that he must be regarded in this equitable distribution of assets as both a partnership and an individual debtor. This, we think, he was without signing his name to the paper, and that the appellants were both partnership and individual creditors; but when, at their own instance, they were subrogated to the rights of the partners, and given an exclusive lien on the assets of the firm for the payment of their debts, when asking equity they will be required to do equity.")

In Re McCOY.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, FOR THE SEVENTH CIRCUIT, 1906.

150 *Federal Reporter*, 106.

GROSSCUP, Circuit Judge, delivered the opinion.

The firm of A. McCoy & Co., was, at the time of the adjudication of bankruptcy, a banking copartnership at Rensselaer, Indiana—the partners being Alfred McCoy and Thomas McCoy, likewise bankrupts; both the firm and the individuals having been adjudged bankrupts July 11th, 1904.

The appellant was, at the time of the transaction in question, a banker in New York City, doing business under the name of A. T. Bowen & Co. August 20th, 1903, there was borrowed from appellant, upon ninety days time, the sum of five thousand dollars, and on November 6th, 1903, the further sum of five thousand dollars, for which two promissory notes were given, signed by the firm of A. McCoy & Co., and by the individual names, Alfred McCoy, and Thomas McCoy; the proceeds of the transaction going into the copartnership business. Upon the firm becoming bankrupt, and the individual partners becoming bankrupt also, these notes were presented and allowed as claims against the firm, and payments thereon have been made to the extent of thirty per cent. The claim presented against the estate of Alfred McCoy, and disallowed, is predicated on these notes to the extent that they remain unpaid.

In addition to the presumption arising on the face of the notes, with the signatures thereto, the record shows that at the time the money was borrowed and the notes executed, appellant said to Alfred McCoy, who negotiated the loan, that he (appellant) "thought some collateral ought to be put up"; whereupon McCoy said that the partners "individually owned four thousand acres of land, and that they would sign the notes individually."

At common law, the notes under the circumstances are not only the obligation of the firm, but also of the individuals; and this is the law in Indiana. Winslow *v.* Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179.

"There seems to be no dispute," says Mitchell, J., in *Winslow* v. *Wallace, supra,* "as indeed there could not well be, upon the proposition that a creditor who holds a note of which a firm are the makers, and one or more members thereof endorsers, has in his hands a valid joint obligation against the firm, and at the same time a distinct, several and separate obligation against those who have signed as endorsers. This result flows from the fact that the contract of an endorser is entirely independent of and distinct from that of the maker, each contract being in itself, when the endorsement is in regular course, conclusive in its legal import. The creditor holding a note so made and endorsed, may, therefore, pursue his remedy against the partners as makers, and he may also proceed against those individually liable as endorsers. When the property of the firm, or the individual estates of the members bound as endorsers, are being judicially administered, the creditor is entitled to participate with the partnership creditors in the joint estate, and he may at the same time avail himself of any appropriate remedy he would otherwise have against the endorsers or their respective estates. He may receive dividends from the joint estate as a partnership creditor, and from the separate estate of the partners liable on their contract of endorsement as an individual creditor."

In re Thomas *et al.,* 8 Biss. 139, Fed. Cas. No. 13,886, the case of a note signed by the partners individually for a loan, the proceeds of which went to the copartnership—it is said: "There is a class of cases in which it has been held that where a creditor holds notes signed by a firm, and signed or indorsed also by an individual member of the firm, he may prove against both estates, and receive dividends from both. *In re* Farnum, Fed. Cas. No. 4,674; *Mead* v. *National Bank of Fayetteville,* Fed. Cas. No. 9,366; *Emery* v. *Canal Na-*

tional Bank, Fed. Cas. No. 4,446. These cases establish a rule opposed to the old rule on the subject in England, and the principle thus settled seems to reach out to the question involved in the case at bar. The scope of these decisions is, that when an individual member of a firm, as such, becomes surety upon or indorses an obligation of the firm, he thereby gives what is in the nature of security upon his separate estate to the firm creditor; and, by reason of the individual liability superadded to the joint obligation, he places the firm creditor in a position where he can go against the individual as well as the joint estate. Thus it results, that without the indorsement or individual signature of one of the firm, the firm creditor would have no right to claim against the individual assets until individual creditors had been first satisfied. But holding the individual indorsement or signature, the firm creditor may, in the first instance, prove against the separate as well as the joint estate. Now, such separate liability would seem to be, at least, in the nature of security though differing radically, it is true, in character and form from that of a mortgage, and yet double proof, by the firm creditor in such case, may be made without any abatement of advantage which his diligence has secured."

Indeed these principles are not seriously controverted —the learned district judge predicating his opinion upon a supposed modification of this rule introduced by the bankruptcy act. That modification, if there be any, is contained in section 5, subd. "f," Act July 1, 1898.

This provision was not intended, as we look at it, to modify in any respect, the pre-existing law. The section is, indeed, only a re-enactment of pre-existing law. The claim disallowed, was not a claim for the payment of a partnership debt out of the individual estate. Had it been the disallowance would have been proper; for both under the section of the statute, and under the pre-existing law, any surplus remaining after the payment of individual debts would have been added to the partnership assets, and thereby have become available to the payment of appellant's debt. The

claim disallowed, was a claim for McCoy's individual debt —as much so as if McCoy had individually, on a separate piece of paper, obligated himself for this debt. And because it is his individual debt it is provable under the section cited, as well as under the general law, against his individual estate. True, the proceeds of the loan having gone into the partnership estate, it may be that individual creditors could insist, that in the marshaling of assets, the partnership estate should be exhausted before payment is made by the individual estate. That, however, is a question we do not decide, for the appellant only seeks to prove his claim against the individual estate, to the extent that it is unpaid by the partnership estate.

The opinion of the District Court rests chiefly upon the case of *Gauss* v. *Schrader* (C. C.) 48 Fed. 816, in which two men, indebted as partners on two promissory notes past due, entered into a written contract in consideration of an extension of time, to convey to the creditor certain property, not a part of the partnership assets, as additional security. Upon the creditor seeking to prove his claim, arising out of this executory promise, against the individual estate of one of the partners, the court well said that the character of the principal indebtedness was not thereby changed—that the partnership debt was not thereby made an individual debt.

In England the old rule was, that in administering the bankrupt laws of that country, double proof against the partnership estate and the individual estate of the partners was not allowed. But this rule has not been followed in this country (*Emery* v. *Canal National Bank,* Fed. Cas. No. 4,446; *Bump's Bankruptcy* [5th Ed.] p. 198; *In re* Bradley, Fed. Cas. No. 1,772; *In re* Farnum, Fed. Cas. No. 4,674; *Mead* v. *National Bank of La Fayette,* 6 Blatchf. 180, Fed. Cas. No. 9,366; *In re* Bigelow, 3 Ben. 146, Fed. Cas. No. 1,397); and there is nothing in the bankruptcy act showing that this English rule was intended to be embodied in our

act. Indeed, it is doubtful if the old rule is now in force in England.

The order appealed from must be reversed, with instructions to the court below to allow the claim as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate, to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Co.[1]

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[1] Judge Anderson in the Court below said: "The petitioner contends that by reason of his diligence in securing the individual names of the partners to the notes, under the circumstances testified to by him, he has the right to pursue the partnership estate and the individual estates at the same time; the only limitation being the full satisfaction of his debt. Suppose it be conceded that petitioner's testimony as to his extending credit upon the faith of the individual property and the circumstances of the execution of the notes was properly admitted, and that it be given full effect, then the case stands as though there had been written into the notes an express stipulation that 'in the event of the bankruptcy of the firm and the members composing it, the payee shall have the right to file this note against the partnership estate and the individual estate of the partners, and share in each until this note is fully paid.' In effect this is what the petitioner claims.

"The bankrupt law impairs the obligation of the debtor's contracts and discharges him from all of them. The Bankrupt Court steps in and takes possession of the property of failing debtors, notifies creditors to establish their debts, apportions the debtor's property among his creditors, and gives the debtor his discharge. In case of a partnership the act specifically provides how the partnership and individual property shall be distributed. * * *

"If petitioner is right in his contention here, he, being one creditor only, can make an agreement with his debtor that in the event of bankruptcy another rule of distribution shall be effective. It may be conceded that a failing debtor may make a contract with all of his creditors to distribute the debtor's estate in a different way from that provided in the bankrupt law, but how can it be contended that one creditor may make such a contract with the debtor to the prejudice of other creditors, when such other creditors are not parties to the contract and know nothing about it?

"Petitioner claims that his notes are New York contracts, and that he contracted with reference to that law, etc. All the creditors of the firm and of the individuals composing the firm must be held to have contracted with a view to the bankrupt law and of its provisions relating to the distribution of the debtor's property in the event of bankruptcy, and surely it cannot be held that one creditor, even by the exercise of 'superior diligence,' can make a contract with the debtor, the effect of which is to change the rule of distribution in the event of insolvency and give him an advantage over other creditors of the class to which he claims to belong. Yet this is just what the petitioner asks. His debt is a partnership debt. He has so declared, and he has filed it against the partnership estate and has already received 30 per cent. of it from that estate. One thing is clear—he is a partnership creditor, and, as such, under the plain letter of the law, he cannot resort to the individual estate until individual creditors are first paid, so reads the law, but he says the debtor agreed that he should be an individual

creditor also, and as such should have the right to resort, notwithstanding it will prejudice the legal rights of the individual creditors, and notwithstanding they knew nothing of and never assented to such an agreement, to share equally with individual creditors for the payment of this debt. To state such a proposition is to answer it.

"As between themselves the debtor and petitioner can by contract agree that a debt which is a partnership debt shall be treated as an individual debt, but surely such agreement cannot affect the rights of other individual creditors under the bankrupt law."

CHAPTER XIII

FRAUD ON CREDITORS.

SECTION 1.—ON PARTNERSHIP CREDITORS

Ex Parte RUFFIN.

In the High Court of Chancery, Before Lord Eldon, 1801.

6 *Vesey Junior's Reports*, 119.

In June, 1797, Thomas Cooper of Epsom, brewer, took James Cooper into partnership. That partnership was dissolved by articles, dated the 3d of November, 1798; under which the buildings, premises, stock in trade, debts, and effects, were assigned to James Cooper by Thomas Cooper; who retired from the trade. Upon the 2d of April, 1800, a commission of bankruptcy issued against James Cooper; under which the joint creditors attempted to prove their debts; but the Commissioners refused to permit them; upon which a petition was presented to Lord Rosslyn; who made an order, that the joint creditors should be at liberty to prove; with the usual directions for keeping distinct accounts, and an application of the joint estate to the joint debts, and of the separate estate to the separate debts. At a meeting for the purpose of declaring a dividend the Commissioners postponed the dividend, in order to give an opportunity of applying to the Lord Chancellor; in consequence of which this petition was presented; praying that the partnership effects remaining in specie, and possessed by the assignees, may be sold; and that the outstanding debts may be accounted joint estate.

By the articles of dissolution the parties covenanted to abide by a valuation to be made of the partnership property; and James Cooper covenanted to pay the partnership debts

then due, and to indemnify Thomas Cooper against them; and Thomas Cooper covenanted not to carry on the trade of a brewer for twenty years within twenty miles of Epsom. A bond for £3,000, the calculated value of the partnership property assigned, was given to Thomas Cooper by James Cooper and his father, as surety. In pursuance of the covenant the partnership property, consisting of leases, the premises, where the trade had been carried on, stock, implements, outstanding debts, and other effects, were valued by arbitrators at £2,030 after charging all the partnership debts then due. James Cooper by his affidavit stated that all the joint creditors knew of the dissolution and the assignment of the property; that advertisements were published; and the deponent after the dissolution received many debts due to the partnership; but paid more on account of the partnership. His father by affidavit stated, that he paid the interest of the bond regularly; and intended to pay the principal, when due.

Mr. *Romilly* and Mr. *Cullen* for the joint creditors, and Mr. *Bell* for *Thomas Cooper*.—If one partner can by assigning all his interest in the effects prevent the joint creditors from going against those effects, fraud must be the consequence. The partners may agree to divide the effects, and carry on business separately. By this agreement between the partners the whole fund of the joint creditors is taken away. Upon the principles, upon which the effects, joint at the date of the bankruptcy, are applied to the joint debts, effects, joint at the dissolution of the partnership, and remaining the same in specie at the time the commission issues, should be considered joint property. The ground is that credit has been given upon the faith of the joint property; and it is a fraud upon the persons giving that credit to apply that fund to the separate creditors, trusting only to the individual and to the separate effects; and that ground applies equally to this case. Until the partnership accounts are taken, there is no separate property but in the surplus after paying the partnership debts [*Taylor* v.

Fields, ante, vol. iv. 396; *post,* xv. 559, n.]: the creditors standing in the place of the bankrupt. The joint creditors, therefore, have a mediate, if not a direct, lien upon the whole of the partnership effects. At law, the partnership creditors have more advantage than under a commission; taking the partnership effects exclusively, and the separate effects with the separate creditors. What difference arises from the circumstance, that the partnership did not exist at the time of the bankruptcy? That is not sufficient to take the case out of the common rule. In *West* v. *Skip* [1 Ves. 239, 456] it is laid down that upon a dissolution by agreement or by time the partner out of possession is not divested of his property in and lien upon the partnership effects. The same right remains to an account of the partnership effects; in which the *first item* always is the payment of the partnership debts. The position, that partners can as between themselves by any act or agreement alter the partnership stock, so as to affect the rights of third persons, cannot be maintained. Why have they not an equal right in the same manner to discharge their persons by such act or agreement; especially, if with the knowledge of the joint creditors; but *Heath* v. *Percival* [1 P. Will. 682.] shows that circumstance will not bind them; the transaction being *res inter alias acta.* That an actual assignment and divesting partnership property out of one partner will not defeat the right against the partnership effects, is proved by *Ex parte Burnaby* [1 Cooke's Bank. Law, 253, 4th edit.; 8th edit. by Mr. Roots, 269]. No evidence is produced to show that the separate creditors thought this was separate property; and gave credit accordingly: it must therefore be taken, that they knew, it was not. The assignment is made upon condition and subject to the payment of the partnership debts. A considerable part of the property consisted of debts; which are not assignable.[1]

[1] The Reporter's notes of the argument of counsel for the assignees are omitted.

Lord CHANCELLOR: This case is admitted, unless *Ex parte Burnaby* applies to it, to be new in its circumstances. Therefore, if I was of opinion, that the petition could be supported, I should be very unwilling to express that in bankruptcy; where my opinion would not be subject to review. If the case I have mentioned has decided the point, there is the authority of Lord Hardwicke upon it; which would weigh down the most considerable doubt, that I could be disposed to entertain. I feel great difficulty in complying with the prayer of the petition; and, when I read it, was struck with it, as a new case; and as one upon which I do not clearly see my way to the relief prayed. It is the case of two partners; who owed several joint debts; and had joint effects. Under these circumstances their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint: his execution might be either joint or several. He might have taken in execution both joint and separate effects. It is also true, that the separate creditors of each by bringing actions might acquire a certain interest even in the partnership effects; taking them in execution in the way, in which separate creditors can affect such property. But there was no lien in either.

The partnership might dissolve in various ways: first by death; secondly, by the act of the parties; that act extending to nothing more than mere dissolution; without any special agreement as to the disposition of the property, the satisfaction of the debts, much less any agreement for an assignment from either of the partners to the others. The partnership might also be dissolved by the bankruptcy of one or of both, and by effluxion of time. If it dissolved by death, referring to the law of merchants and the well-known doctrine of this Court, the death being the act of

God, the legal title in some respects, in all the equitable title, would remain notwithstanding the survivorship; and the executor would have a right to insist that the property should be applied to the partnership debts. I do not know, that the partnership creditors would have that right, supposing both remained solvent. So, upon the bankruptcy of one of them there would be an equity to say, the assignees stand in the place of the bankrupt; and can take no more than he could; and consequently nothing, until the partnership debts are paid. So, upon a mere dissolution, without a special agreement, or a dissolution by effluxion of time: to wind up the accounts the debts must be paid; and the surplus be distributed in proportion to the different interests. In all these ways the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts. The joint creditors must of necessity be paid in order to the administration of justice to the partners themselves. When the bankruptcy of both takes place, it puts an end to the partnership certainly: but still it is very possible, and it often happens in fact, that the partners may have different interests in the surplus; and out of that a necessity arises, that the partnership debts must be paid: otherwise the surplus cannot be distributed according to equity, and no distinction has been made with reference to their interests, whether in different proportions, or equally. Many cases have occurred upon the distribution between the separate and joint estates; and the principle in all of them, from the great case of Mr. Fordyce, has been, that if the Court should say, that what has ever been joint or separate property shall always remain so, the consequence would be that no partnership could ever arrange their affairs. Therefore a *bona fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern; and binds the creditors; and therefore the Court always let the arrangement be, as they stand, not at the time of the commission, but of the act of bankruptcy.

Thomas Cooper is admitted to be solvent. He certainly has no such equity, as if the partnership had been dissolved by bankruptcy, death, effluxion of time, or any other circumstance, not his own act. But he dissolves the partnership a year and a half go, and, instead of calling upon these effects according to his equity at the dissolution to pay the partnership debts, he assigns his interest to the other, to deal as he thinks fit with the property, to act with the world respecting it; desiring only a bond to pay a given value in three or four years. Therefore he or his executors could not sue. If it was necessary for the creditors to operate their relief through his equity, he has no equity. It is then said, and the circumstance had struck me, that all the property is not assignable at law: for instance the debts: but as between the two Coopers they were the property of the bankrupt; for debts are within the statute of King James [Stat. 21 Jam. I. c. 19, s. 10, 11]; and if left in the order and disposal of the bankrupt, he is proprietor of the debt. Therefore Thomas Cooper could never set up the insufficiency of the legal operation of the assignment against his own deed. The assignment was not made subject to the payment of the debts, but in consideration of a covenant, leaving no duty upon the property, but attaching a personal obligation upon the assignee to pay the debts. The creditors therefore cannot rest upon the equity of the partner going out. I was struck with the argument of inconvenience: the inconvenience on all sides is great. To say this seems to me a monstrous proposition: that, which at any time during the partnership has been part of the partnership effects, shall in all future time remain part of the partnership effects; notwithstanding a *bona fide* act. Suppose, an improbable case, that the partners in Child's house chose to shift their shop from Temple Bar to the west end of the town; and that house, now the property of the partnership, was *bona fide* bought by one of the partners; and the money was invested in the purchase of the new house, in which they were going to reside: suppose a still more

improbable case, that a year and a half or ten years afterwards they became bankrupt: would that house be part of the partnership effects? It would be so, if it remained without the legal interest being passed, or without any equitable claim, taking it out of the reach of a legal execution: but where the effect is a *bona fide* transaction of this sort, if it were held at any time afterwards to be partnership property, not for the purpose of satisfying demands of the partners, or of any creditor, who cannot otherwise be satisfied, but to enable them to undo all the intermediate equities, commercial transactions could not go on at all. It would be much less inconvenience to examine the *bona fides* of each transaction than to say, such transactions shall never take place.

The case of *West* v. *Skip* falls within some of the observations I have made. *Heath* v. *Percival* does not apply at all. The bond in that case was not given up; and therefore the creditor keeping the best security, and refusing to part with it, no inference can be made against the conclusion arising from that. *Hankey* v. *Garratt* is also very different. There the partnership was dissolved by bankruptcy or by death: and there was no actual transfer of the property to take it out of the reach of legal execution. I am unwilling to make any observation upon *Burnaby's Case*. I do not know how to understand it. Whether there was anything special in the assignment, I cannot find out from the report. I shall endeavor to find the papers. It looks very like this case; if it is in specie this case, as an authority I should think myself bound to submit to it. But if it is not in specie this case, there is so much doubt, whether this relief can be given, that I am satisfied, it ought to be given, if at all, in a jurisdiction, where my opinion would be subject to review. My present inclination is that the creditors have not this equity. I have considerable doubt also, whether, if they have it, Thomas Cooper would be benefited by it; and a farther subject of grave and serious doubt is, whether, if the joint creditors disturb the arrangement, the

separate creditors would not have a right to set the arrangement right at his expense.

I now think, there is a circumstance that distinguishes *Burnaby's Case.* The assignment was not by one to the other two, but by one to one of the other two; which may be very different. I think, that circumstances distinguishes the case so much that I shall consult the interest of the parties better by saying, they may file a bill, if they think proper, than by farther delay.

The Petition was dismissed.[2]

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[2] *Compare: Ex parte Williams,* 11 Ves. 3, 1805 (Eldon, J.: "I have frequently since I decided the case of *Ex parte Ruffin,* considered it; and I approve that decision. In a subsequent case the dissolution took place only a week before the question arose; and the true question, I thought, was upon the *bona fides* of the transaction, whether that, which had been joint estate, has become separate estate * * *. Upon the facts of this case * * * there is distinct evidence of an agreement [among the partners] that the joint effects shall be considered separate effects, and that fact calls upon me to declare the conclusion of law, that there are separate effects.")

Holderness v. *Shackels,* 8 B. & C. 612, 1828 (A, B, *et al.,* were partners. The partnership property consisted in part of oil. The oil was placed in barrels, the portion to be allotted to each partner marked with his name, and deposited in a warehouse. The warehouseman received instructions to deliver to each partner on demand the barrels marked in the partner's name, unless the managing partner, B, notified him that the partner was indebted to the partnership for his share of the disbursements. B notified the warehouseman that A was indebted to the partnership. A became a bankrupt. C, A's assignee, brought an action of trover against B. Judgment for defendant).

HOWE *v.* LAWRENCE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1852.

63 *Massachusetts Reports*, 553.

THIS was a petition to this Court, under the insolvent law of 1838, c. 163, §18, seeking to reverse an order of distribution made by Myron Lawrence, Esq., a commissioner of insolvency, in the county of Hampshire, on the estate of William W. Gardner, an insolvent debtor. The case was referred to a master, upon whose report the following facts appeared:

On the first day of January, 1850, Henry D. Shaw and William W. Gardner formed a copartnership in trade, in Haydenville, in the county of Hampshire, under the name of Shaw and Gardner. On the twenty-fourth day of January, 1851, the parties being mutually dissatisfied, said firm was dissolved, and Shaw conveyed all his interest in the partnership property to Gardner, he agreeing in consideration therefor, to pay all their joint debts. The firm and both partners were at that time insolvent, although there was not sufficient evidence to warrant the belief that either partner then knew it. Immediately after the dissolution, Gardner informed the creditors of the firm that he should continue the business, and had agreed to pay all the partnership debts of Shaw and Gardner. He did continue the business a few weeks, and in that time added to the stock, to an amount of five or six hundred dollars. On the twenty-seventh day of February, 1851, said Gardner filed a petition before said Myron Lawrence, Esq., for the benefit of the insolvent laws of this commonwealth, and his whole stock in trade, a greater portion of which was the identical property formerly owned by Shaw and Gardner, passed into the hands of Gardner's assignees. It was sold by them for $1,670.39. The claims against the former firm of Shaw

and Gardner, proved against Gardner's estate, were $5,050; and his private debts proved, amounted to $850. The said Myron Lawrence, commissioner of insolvency, ordered that the separate creditors of said Gardner should be paid in full from his estate, and that the balance remaining should be distributed to the joint creditors of the firm of Shaw and Gardner. The prayer of the petition in this case was, that all that portion of said Gardner's estate which had formerly belonged to Shaw and Gardner, might be distributed to the creditors of that firm, to the exclusion of the separate creditors of Gardner, or that his entire estate might be distributed, *pari passu,* to the joint and separate creditors. The petitioners were creditors of the firm of Shaw and Gardner, and had proved their claim against Gardner's estate. The respondent Lawrence, admitted the facts set forth in the petition and submitted himself to the direction of the Court. The other respondents were separate creditors of said Gardner, who had proved their claims against his estate, and objected to the prayer of the petition. The said Henry D. Shaw was also in insolvency in the county of Hampden, and there was no property of the former firm of Shaw and Gardner except what had been conveyed to said Gardner as before stated.[1]

Bigelow, J.: Upon the facts reported by the master in this case, two questions arise.

The first is, whether the property, which belonged to the partnership of Shaw and Gardner, and which, upon the dissolution of the partnership, on the twenty-fourth of January, 1851, was sold and transferred by Shaw to Gardner, is to be treated as the separate estate of Gardner, and to be appropriated as such to the payment of his separate debts; or whether, notwithstanding the sale and transfer by one partner to the other, it is still to be regarded as joint estate, and to be applied to the payment of the debts of the partnership accordingly.

[1] The Reporter's notes of the argument for the petitions are omitted.

The right of copartners upon dissolution to transfer the joint property to one of the firm, is clear and unquestionable. The effect of such transfer as between the partners is to vest the legal title to the property in the individual partner, with a right to use and dispose of it as his separate estate. It would seem to follow as a necessary consequence, that the creditors of the firm, after such conveyance, would have no right to look to the property transferred as joint property, upon which they had any special claim or lien. If in such transfer there is no fraud and collusion between the copartners for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith, upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate with all the rights and incidents both in law and equity, which properly attach thereto. The mere fact of the transfer of the property does not in any way affect the rights of the joint creditors. During the continuance of the partnership, and before the institution of proceedings in insolvency, the creditors of the firm have no specific claim or lien, and, strictly speaking, no equity as against the effects of the partnership. They can only institute actions at law for their debts against the firm on which they can take the partnership property, or the separate estate of such partner, or both, for the purpose of satisfying the executions, which they may obtain upon their judgments against the firm. The joint property, after its transfer to one of the copartners, is equally within the reach of legal process by the creditors of the firm as if it had remained the property of the partnership. Beyond this right to seize the joint property on legal process, the creditors of the firm, before proceedings in insolvency, have no control over the partnership effects, and no right, either in law or equity, to restrain the disposition of them. The partners have the power to transfer them for a valuable consideration to each other or to strangers. The only limitation upon this right is, that it shall be exercised *bona fide,* and without any intent to defraud the creditors

of the firm or to deprive them of their legal or equitable claims upon the joint estate in case of insolvency. The *bona fides* of the transaction is, therefore, the only test by which to determine the right of joint creditors to have property, which has been transferred upon dissolution to an individual member of the firm, applied to the payment of the joint debts. If the transfer has been made honestly and for a valuable consideration, the property has thereby become separate estate, wholly free from any claims of the joint creditors. These principles are fully recognized in the adjudged cases both in this country and in England. Collyer on Part. §§174, 894, 903; Story on Part. §358; *Ex parte Ruffin,* 6 Ves. 127; *Ex parte Fell,* 10 Ves. 347; *Ex parte Williams,* 11 Ves. 3; *Ex parte Rowlandson,* 1 Rose, 416; *Campbell* v. *Mullett,* 2 Swan. 575; *Allen* v. *Center Valley Co.* 21 Conn. 130, 137; *Ferson* v. *Monroe,* 1 Foster, 462, 469.

These cases also recognize it as a settled rule that joint estate is not, so far as the rights of creditors are concerned, that which was such at the time of the dissolution, but that in which the partners are jointly interested for the purposes of the partnership and the settlement of its concerns at the time of the institution of proceedings in insolvency by a member of the firm.

The application of these principles to the present case is decisive against the right of the joint creditors to require the property, transferred by Shaw to Gardner, to be appropriated primarily to the payment of the debts of the firm. *Prima facie* it is the separate estate of Gardner, and the burden is on the petitioning creditors to show that it was conveyed to him *mala fide* and in fraud of the rights of creditors. There is nothing in the facts reported by the master from which any such inference can be fairly made. The dissolution took place, because the parties were mutually dissatisfied, and the retiring partner relinquished his right to the partnership property, in consideration of an agreement by his copartner to assume and pay the debts of the firm. It is not pretended that the business of the firm has resulted in any

surplus, nor that the agreement to pay the debts was not a fair and full consideration for the transfer of the retiring partner's interest in the partnership property. The subsequent conduct of Gardner is strongly confirmatory of the good faith of the transaction. He continued to carry on the business, formerly conducted by the firm, and notified the creditors by letter of the dissolution, and that the business would be continued by himself. While he so carried on business on his sole account, he made considerable additions to the stock on his own credit, amounting to five or six hundred dollars. Nor is there any positive evidence that either of the copartners, at the time of the dissolution, knew or believed that the copartnership would not be able to pay its debts in full, although in fact it subsequently turned out to have been at the time insolvent. Even if it were insolvent within the knowledge of the partners, at the time of the dissolution and the transfer of the property, it is by no means certain that the transaction would then be fraudulent. Collyer on Part. § 902; *Ex parte Peake,* 1 Mad. 346. But it is sufficient for the present case that there is no proof of any such knowledge by either of the copartners.

It is not to be inferred, however, that any conveyance or transfer of joint property to a copartner made with a knowledge of the insolvency of the firm and with an intent to deprive the creditors of its proper application to the payment of the joint debts, would defeat the right of the joint creditors in proceedings in insolvency to follow the partnership effects and have them appropriated to the payment of the debts of the firm. Such conveyance would be in fraud of the law, and equity would be at once set aside. It is only where partners act fairly for the purpose of dissolution and winding up the affairs of the firm, that creditors will be bound by a change of the partnership property, to the separate estate of one of the copartners.

It was urged by the counsel for the petitioners, that, as copartners have a lien upon the partnership effects for the discharge of all the debts of the firm, even after a dissolu-

tion, this lien might be made available in the present case for the benefit of the joint creditors; and that in this way the equities of the creditors might be worked out through the medium of that of the retiring copartners. It is undoubtedly true, in the absence of any special agreement between copartners, as to the application of the partnership effects after dissolution, that a retiring partner retains a lien upon them to the extent of enforcing their application to the payment of the joint debts, and that creditors, though they have no lien on the property in their own right, are allowed in equity to assert a *quasi* lien by administering the equities between the partners themselves. But it is equally well settled that a retiring partner may relinquish this lien, in which case he has no equity through which the creditors of the firm can work out their own. By the transfer of the joint property to his copartner, and taking his personal contract and security for the payment of the joint debts, he discharges his lien and substitutes therefor the agreement of his copartner, to which he can alone look for his remedy, in case he is called on to pay the debts of the firm. There is no duty left on the property, but only a personal obligation by one copartner to pay the joint debts. The creditors in such case cannot rest upon the equity of the outgoing partner. Collyer on Part. § 894; Story on Part. § 359; *Ex parte Ruffin, ubi sup.; Ex parte Williams, ubi sup.* The transfer in the present case falls within this principle. Shaw, the retiring partner, relinquished all his right to the property of the firm, in consideration of a promise by Gardner to pay all the debts of the firm. Shaw, therefore, has no lien which can be enforced for the benefit of the joint creditors, upon the partnership effects. The property was transferred absolutely, discharged from any lien or trust, which would have attached to it in the absence of any special agreement between the partners respecting it.

The remaining question presented by the petitioners is, as to the right of the joint creditors of the firm to prove their debts against the separate estate of Gardner, and take

dividends thereon *pari passu* with the separate creditors. This claim is founded upon the recognized exception to the general rule of applying joint estate to the payment of joint debts, and separate estate to the payment of separate debts, which has been established by the English courts in bankruptcy. That exception is, when there is no joint estate and no solvent partner, the joint creditors are allowed to prove and share equally with the separate creditors in the separate estate. It is a sufficient answer to this claim of the petitioners, that the statute of 1838, *c.* 163, § 21, recognizes no such exception to the rule therein prescribed for the distribution of the assets of insolvent debtors. The rule is distinct and peremptory, requiring the net proceeds of the joint stock to be appropriated to pay the creditors of the firm, and the net proceeds of the separate estate of each partner to be appropriated to the payment of the separate creditors. This provision was reported by the learned commissioners who drafted the insolvent act, and enacted by the legislature with a full knowledge of the exceptions which had been engrafted on the general rule of distribution by the course of judicial decisions in England. They designedly omitted them. We know of no rule of construction by which we can now undertake to add them to the statute. The rule fixed by the statute may sometimes operate harshly, as all general rules do, but it is definite, clear, and easily applied. The exceptions to it are artificial and refined, leading to nice and subtle distinctions, and sometimes operating with great inequality and injustice. Indeed, it has been said by high authority, that the character of these exceptions has rendered the foundation of the general rule, as one of justice and equity, open to criticism and question, and difficult to be sustained. Story on Part. §§ 379, 382. Under such circumstances, we are unwilling to adopt it into our jurisprudence. The rule fixed by the statute must be adhered to. If there is no joint estate and no surplus of the separate estate after paying the separate

debts, the creditors of the partnership can receive no dividend.

Such being the legal and equitable principles applicable to the case made by the petitioners before the commissioner of insolvency, it is clear that there is no ground for maintaining the petition.

Petition dismissed.[2]

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[2] *Compare: In re Collier,* Fed. Cas. 3,002, 1874 (The members of the firm of Collier, Taylor & Co. transferred to Taylor all their interest in the firm property, Taylor undertaking to pay the firm debts. Taylor had individual debts and individual property. More than four months after the assignment, the members of the firm were adjudged bankrupt. The question arose as to the standing of the firm and separate creditors of B in regard to the assets in his hands. The Register, W. F. Bowder, said: "It is now an elementary principle that the promise by one to another for the benefit of a third is binding and enforceable by and in the name of the third party. No principle is more deeply rooted in the American system of jurisprudence than this familiar rule. This doctrine is tenable, it seems, even where the beneficiary was not cognizant of the promise when made, and although the consideration did not move from him. To apply this rule to the case in hearing is perceptibly easy. Taylor, in consideration of certain transfers of property to him, agreed with the two retiring partners, to pay all the debts owing by the firm of Collier, Taylor & Co. By this promise he is bound, and the joint creditors can enforce it against him or claim the benefit of it, either before or after the bankruptcy of their debtor. The general promise of Taylor to pay all outstanding firm liabilities is as much a contract, and is to be treated with as much solemnity as though he had, in writing, indorsed his guaranty on the back of every existing obligation of the copartnership. In a case similar to this, *In re Downing* [Case No. 4,045], Judge Dillon uses this language, in reference to the creditors of the firm, 'I look upon their rights in equity as being the same as if Downing had endorsed the pre-existing firm paper, in which case they could have proved their debts against either, if not both the firm and Downing.'

"It follows from the foregoing that, in our judgment, all the assets should be treated as the separate property of Taylor, and all the creditors should share *pari passu* in the dividends arising therefrom." Ballard, District J., concurred in the opinion of the Register).

BAKER'S APPEAL.

IN THE SUPREME COURT OF PENNSYLVANIA, 1853.

21 Pennsylvania Reports, 76.[1]

LEWIS, J.: These are appeals from the decree of the Common Pleas of Chester County, distributing the estate and effects of James and John Yearsley, lately trading under the firm of James Yearsley & Brother.

On the 1st April, 1847, the five brothers, James, John, Nathan, Thomas, and Benjamin entered into partnership in the iron business. On the 27th July, 1848, Thomas and Benjamin retired from the firm, disposing of their interest in the partnership estate and effects to the other three brothers, the latter agreeing to pay the debts of the firm, and to exonerate and for ever defend the said Thomas and Benjamin from all obligation to pay any part of the same.

On the 1st April, 1849, Nathan Yearsley sold his interest in the partnership property to John Yearsley. It is stated that this sale was without the approbation of James Yearsley. James and John however continued the business, and contracted debts until the 12th December, 1850, when they executed an assignment of the partnership property of the said James Yearsley and John Yearsley, trading and doing business under the firm name of James Yearsley & Brother. This assignment was expressly to pay the creditors of the partnership "composed of the said James Yearsley and John Yearsley."

There are three classes of creditors claiming distribution of the fund in the hands of the assignee. 1. The creditors of the first firm, consisting of the five brothers. 2. The creditors of the second firm, consisting of the three brothers. And, lastly, the creditors of the third firm, consisting of the two brothers who made the assignment expressly for the benefit of their own partnership creditors.

[1] The Reporter's statement of the facts of the case is omitted.

The appellants, Davis and Baker, are creditors of the first firm, and McGowan was originally a creditor of that firm, but now claims to be a creditor of the second firm by means of a note given by the latter upon the surrender of his claims against the first partnership. McGowan also claims to be a creditor of the second firm for a sum of money loaned; but as this claim has been allowed to participate in the distribution, without exemption, its right will not be considered here, nor its position disturbed.

Where the interest of one partner in the partnership property passes to another person, it is immaterial whether that transfer be effected by a sale by the partner himself for a valuble consideration—by a sale of his interests on execution—by his death and the succession of his executor or administrator, or by assignment under the bankrupt or the insolvent laws. "In all these cases the party coming in the right of the partner, comes into nothing more than an interest in the partnership which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner; and it is an *item* in the account, that enough must be left for the partnership debts." *Taylor* v. *Fields,* 4 *Vesey Jr.* 396; and *Deal et al* v. *Bogue.* See 8 *Harris* 228.

But it is well settled, that the right to confine such partner, or those who claim title under him, to his interest in the surplus, after payment of the partnership debts, is an equity *which rests in the other partners alone, and not in the creditors of the firm.* The latter have no lien on the property, and must work out their preference in the distribution of the partnership funds, entirely through the medium of the partners whose interests remain undisposed of: *Story's Equity,* § 1253. If they consent or submit to a different disposition of the assets, the preference of the creditors is at an end, and they must rely upon the personal responsibility of the partners who contracted the debts. Where one partner sells his interest to another, in consideration of an engagement by the latter to pay the partnership debts, the rule

is the same. The engagement to pay them is but a personal contract. It creates no lien on the property. It follows as a necessary consequence, that if the partner who has acquired the interests of his former associates, and in whom resides the right to appropriate the partnership assets to the payment of partnership liabilities, thinks proper to exercise his dominion, and to make a different disposition of them, he has a right to do so; and the preference of the partnership creditors engrafted upon, and deriving its support from his equity, ceases to exist. The scion dies with the stock. These principles are announced in *Story on Partnership,* sections 358, 359; *Gow on Partn.* Ch. 5. *s.* 1; and *Collyer on Partn.* b. 4, ch. 2, s. 1; and appear to be fully sustained by *Ex parte Ruffin,* 6 *Vesey, Jr.* 126; *Taylor* v. *Fields,* 4 *Ves. Jr.* 396; *Kelly's Appeal,* 4 *Harris,* 59; 11 *Ves. Jr.* 3; 10 *Ves. Jr.* 347; *Doner* v. *Stauffer,* 1 *Penn. R.* 198; *Campbell* v. *Mullet,* 2 *Swanst.* 552, and other authorities. Lord Eldon, in *Ex parte Ruffin,* seemed to think that if the right to dispose of the assets did not exist in the partners, "no partnership could ever arrange its affairs." And Chief Justice Gibson has shown, in *Doner* v. *Stauffer,* that after a sale of the interest of one partner, the equity and the interest of the remaining partner is the subject of sale on a separate execution against him, which passes the entire interest to the purchaser. And that where the interest of each is sold on separate executions for their individual debts, the partnership creditors can neither follow the property in the hands of the sheriff's vendee, nor claim any portion of the proceeds of sale. There can be no stronger illustration than this of the principle that the partnership creditors have no equity of their own upon which they can enforce a preference, or control the partners in exercising dominion over their assets, so long as they remain unencumbered by liens.

If the property from which the fund in Court arises had been assigned for the benefit of the creditors of the second firm, composed of the three brothers, a question might arise whether, by their agreement to pay the debts of the first

firm, they did not convert those debts into debts of the second. But it is not necessary to discuss that question, inasmuch as the assets have been assigned for the benefit of the creditors of the last firm, composed of the two brothers. As the whole right of property existed in those two brothers, at the time of the assignment, their right to appropriate it to the payment of the partnership debts of the firm to whom it belonged is clear and unquestionable. The Act of 1843 does not stand in the way of such an assignment. That Act was not intended to deprive partners of their legal and equitable right to appropriate partnership assets to the payment, without preference, of all the debts of the firm to whom the property belonged at the time of the assignment.

The right of property existing in James and John Yearsley at the time of assignment, their right to appropriate it to the payment of the debts of the firm of which they were the only members being established, and the fact that they have so appropriated it being also shown, the only remaining question is, do the appellants belong to that class of creditors? This is the pinch of the case. They were all originally creditors of the *first* firm. McGowan afterwards became a creditor of the *second*. But neither of them is a creditor of the *third*, unless he has become so without his knowledge or consent, by the sale made by Nathan Yearsley to his brother John, and by the act of John in bringing his interest thus purchased, into the new partnership, composed of himself and his brother James. It is not necessary to cite authorities to prove that it takes at least two to make a bargain. Nothing can be clearer than that these transactions between the partners created no contract with their creditors. No creditor could thereby be compelled to release his demand against five for the more uncertain security of a claim against two. These transfers neither discharged the original partners, nor imposed upon the subsequent firm any new liabilities to the creditors of the first. And they furnish no foundation whatever for an action by the creditors of the two first firms against the partnership last established. A

creditor without a right of action is a legal impossibility. If John, when he purchased the interest of Nathan, had agreed with the latter to pay the debts of the old firm, this would not have made them his creditors; and if it had, they would not thereby have become the creditors of the new partnership about to be established. But we have no evidence of the terms of this sale, or of the consideration upon which John brought his interest into the new partnership with James, and afterwards united with him in applying the assets to the debts of that firm. The effect of the sale by Nathan to John was to dissolve the old firm, and to transfer Nathan's interest in the assets to John, *subject to the right of James to insist on applying them in the first place to the payment of the liabilities of the old firm.* This right he might insist upon or waive, at his pleasure. That he waived it is demonstrated by his application of the assets to other purposes. To allow creditors of the two first firms to claim any portion of this fund would invert the well established principle that the preference of partnership creditors is not founded upon any equity of their own, but must always be worked out through the agency of the partners; it would destroy, without authority of law, the necessary dominion which every man has over his own property, and give the control to those who have fairly transferred all their rights to others. To class these claimants as creditors of the last firm, without their consent, without the consent of the last firm, without any release of their claims against their original debtors, and without any contract or consideration whatever, would be to create a liability where none existed either by the contracts of the parties, or by the law of the land. To permit this would be an illegal interference with the rights of the creditors of the last firm, and a palpable violation of the terms of the assignment.

The errors assigned have not been sustained, and the decree of distribution is therefore to be affirmed.

LOWRIE, J., dissented.

BULLITT *v.* THE CHARTERED FUND OF THE METHODIST EPISCOPAL CHURCH.

IN THE SUPREME COURT OF PENNSYLVANIA, 1856.

26 Pennsylvania Reports, 108.[1]

BLACK, J.: James J. Boswell was in partnership with Munson H. Treadwell. The firm was dissolved in 1850. Treadwell transferring to Boswell all his interest in the partnership effects, and Boswell agreeing to pay all the debts. In 1851 Boswell formed a limited partnership with two other persons, he being the general partner. On the 29th of January, 1853, he assigned to the "Chartered Fund" certain claims against debtors of the firm composed of himself and Treadwell, which was then in the hands of the defendants for collection. The object of this assignment was to pay the "Chartered Fund" a debt due from himself to it. On the same day he assigned to the defendants, for the benefit of creditors, all the property of the limited partnership; and, to one of the defendants, all the other property he had. This suit is brought by the "Chartered Fund" to recover the money collected by the defendants on the claims assigned by Boswell to it.

The first objection made against the right of the plaintiff to recover is the form of the action. The defendants insist that the suit should have been brought in the name of Boswell & Co., for the use of the "Chartered Fund," and not by the "Chartered Fund," as the legal plaintiff. The action is right enough. It is not brought on the original indebtedness to Boswell & Co., but on the implied undertaking of the defendants that they would pay the money which they collected to the party it belonged to. That party was the "Chartered Fund," if its assignment of the debts was valid.

It is argued that, these claims being part of the assets

[1] The Reporter's statement of the facts of the case, and his notes of the arguments of counsel are omitted.

of Boswell & Co., Boswell had no power to assign them in payment of a debt due from himself. It is a sufficient answer to this, that the partnership between Boswell and Treadwell had been dissolved long before the assignment. The outgoing partner had a right to demand that Boswell should pay the debts of the firm, for such was the contract; but a suit on the contract was his only means of enforcing that obligation. The creditors of Boswell & Co. had a right to demand that the assets of the firm, as well as the separate property of the remaining partner, should go to the satisfaction of their just claims, but they had no specific lien on either which would enable them to follow it into the hands of a *bona fide* purchaser. When one of two partners retires from the business, relinquishing to the other all his interest in the partnership property, the remaining partner has the same dominion over it as if it had always been his own separate property.

But, at the time Boswell made this assignment to the plaintiff to pay a private debt of his own, there existed a limited partnership between him and two other persons, he being the general partner, and carrying on the business. It is admitted that this partnership was insolvent. By the 21st sect. of the Limited Partnership Law, every assignment by the general partner of his own property, if made when the partnership is insolvent, is void as against the creditors of the partnership. The defendants are assignees for the benefit of the partnership creditors, and in the name of those creditors they claim the right to set aside the previous assignment to the plaintiff as void under the section just cited. But does a voluntary assignment like this put the assignees in the place, and arm them with the power of creditors? The cases of *Twelves* v. *Williams* (3 *Wharton* 485), and of *Vandyke* v. *Christ* (7 *W. & Ser.* 373), decide the question in the negative. Voluntary assignees represent only the debtor himself; and as to him, his own assignment of the claims to the plaintiff was valid and binding.

Judgment affirmed.

FRANKLIN SUGAR CO. *v.* HENDERSON.

IN THE COURT OF APPEALS OF MARYLAND, 1897.

86 *Maryland Reports*, 452.[1]

McSHERRY, C. J.: These four cases come up from a *pro forma* order quashing attachments sued out by the appellants against the appellees, Henderson, Pfeil and Company. In November, eighteen hundred and ninety-two, John B. Henderson, George Henry Pfeil and Alexander J. McDonald formed a copartnership which carried on business in Baltimore City until October the fourth, eighteen hundred and ninety-five. On that day the copartnership was dissolved. It was indebted at the time to sundry persons, but whether it was insolvent or not is one of the controverted issues of fact that will be considered later on. Henderson sold his interest in the concern to his associates, and assigned and made over to them all of his right and title, as a member of the firm, in and to the property and assets of every kind, real, personal and mixed, owned by the copartnership. Notice of dissolution was given and Pfeil and McDonald at once formed a new firm under the old name. Just ten days afterwards—that is, on the fourteenth day of October, eighteen hundred and ninety-five—Pfeil and McDonald executed a deed of trust to Oscar Wolff, Esq. The deed was made by "George H. Pfeil and Alexander J. McDonald, trading as Henderson, Pfeil and Company," and is *not* signed by Henderson. It recites that "the parties of the first part," that is Pfeil and McDonald, "are indebted to divers persons and firms in various sums of money, and have become and are unable to pay such indebtedness in full;" and that, "in order to have *their* assets and effects collected and faithfully applied to the payment of *their said debts*" (that is, the debts due by the grantors) the assignment was made.

[1] The Reporter's notes of the arguments of counsel are omitted.

After making provision for the payment of costs and commissions and such preferences as the law creates, the deed proceeds to declare that the trustee shall apply the "proceeds of the joint stock of the *said* copartnership"—that is, the copartnership of which Henderson was *not* a member—to pay the creditors of the copartnership, that is, the copartnership composed of Pfeil and McDonald, "and to appropriate the net proceeds of the separate estate of each partner to pay his separate creditors," and the surplus of each partner's separate estate after the payment of his individual creditors, is directed to be added to the social assets, and the surplus, if any, of the partnership assets is directed to be divided between the partners in the proportions of their respective interests, and to be applied to the payment of their separate debts. It is important to observe that the deed of assignment makes no reference whatever to the old firm of which Henderson had been a member, and contains no provision, in terms or by implication, for the payment of the creditors of *that* firm out of the assets owned by it on October the fourth, the day of its dissolution.

On October the fifteenth—the day following the execution and recording of the deed of trust—the appellants, who are creditors of the old firm of Henderson, Pfeil and Company, sued out of the Superior Court of Baltimore City, attachments which they caused to be laid in the hands of Mr. Wolff as garnishee. They allege, as one of the grounds upon which the attachments are founded, that Henderson, Pfeil and McDonald have assigned, disposed of or concealed or are about to assign, dispose of or conceal their property or some part thereof with intent to defraud their creditors. The garnishee appeared, pleaded *nulla bona* and filed a motion to quash, founded on the claim that the property and assets attached were the property and assets of Mr. Wolff, the trustee, and not of the defendants. The motion was heard and the learned Judge at Large was of opinion that the motion to quash ought to be overruled; but by an agreement made between the parties a *pro forma* order was signed over-

ruling the motion and finally quashing the attachments. From this *pro forma* order the pending appeals were taken.

A reversal is claimed upon two grounds, and these are: First, that the deed of trust to Mr. Wolff is fraudulent in law as hindering and delaying the creditors of the old firm; and, secondly, that the deed is fraudulent in fact.

We may as well dispose of the second ground first, because but little need be said respecting it. The record has been minutely read and carefully considered, and we all agree that it furnishes not the slightest warrant for impeaching the deed on account of actual fraud. The conduct of Mr. Wolff throughout is free from the faintest shade of bad faith. There is nothing to suggest even a suspicion that he was not actuated by the very highest and most honorable motives and intentions; and there is no evidence whatever that can be tortured into an imputation of bad faith. We are thoroughly convinced that the trustee acted in the utmost good faith; and we accordingly dismiss this branch of the case without further comment, and turn, at once, to the consideration of the other.

Partnership creditors have no lien on partnership assets, but the partners themselves have a right to insist upon the appropriation of the joint property to the payment of joint debts, upon the principle that as the joint debts were contracted in making the purchases of the joint assets the latter ought primarily to be charged with the burden of paying the former. The right of the partners to have the joint debts paid out of the joint assets in preference to the right of the separate creditors to be paid out of the same assets, gives rise to the derivative equity of the joint creditors to have payment of their claims out of the proceeds of the copartnership property before any of those proceeds can be devoted, either to the separate use or appropriated to the payment of the separate debts of any of the members of the firm. The derivative right is the right of the creditor—it belongs to him—and the partners have, if insolvent, no power or authority to destroy or impair it to his injury or prejudice.

This is so in the very nature of things. Any act, therefore, of the partners which is destructive of this right of the creditor and which, as a result, hinders, delays and interferes with his assertion of it and impedes his ability to realize, through its enforcement, the payment of the debt due to him by the firm, is, by operation of law, a fraud upon the creditor if the copartnership is itself insolvent. This principle has been often applied. In a number of cases it has been held, and it may certainly be regarded as the law of Maryland today, that the conversion of the firm's assets into individual assets by an assignment from one partner of all his interest in the concern to another, works a conversion of the property from joint to separate property, and when the firm is insolvent, operates to hinder, delay and defraud the firm's creditors, if the transfer be permitted to stand. It is obvious that this must be so. As the creditor's preference or priority to be paid out of the joint property can only be worked out through the partner's right to have that property applied in the first instance, to the payment of the firm's creditors; and as the individual creditors have a prior right to require that the separate estate shall be first applied to the satisfaction of the individual debts, it necessarily follows that the conversion of the joint property into separate property, if sustained, would, when the firm and its members are insolvent, destroy the right of the partnership creditors to a preference over the creditors of the individual partner to whom the assets had been transferred; because when the assets cease to be joint assets the right of the partner to have them applied to the payment of partnership debts is gone, and when that right is gone the derivative right of the firm's creditor is extinguished. This being the consequence of such a transfer of the assets, the transfer itself, when the firm is insolvent, is inhibited and is deemed ineffectual to convert the joint property into separate property as against the firm's creditors. *Collier* v. *Hanna,* 71 Md. 261; *Darby* v. *Gilligan,* 33 W. Va. 249; *S. C. with notes,* 6 L. R. A. 740.

Whilst this principle is not denied as being applicable to

a case where a transfer has been attempted by one or more partners to another singly, it is insisted that it has no relation to a case where the transfer has been made by a retiring partner to *two or more* of his copartners who continue business; and the reason assigned is that the joint assets are not, by such a transfer, converted into separate assets but remain the joint property of the copartners to whom they are transferred. The difference in the facts does not produce a difference in the result, so far as respects the creditors. By the express agreement of the three partners and by the withdrawal of Henderson from the firm the copartnership of Henderson, Pfeil and Company was dissolved at the close of business on the fourth day of October, eighteen hundred and ninety-five. The new copartnership was at once formed and under the transfer from Henderson assumed to acquire all his rights and title to the old firm's property. The transfer of the old firm's whole assets to the new firm, if valid, as effectually precluded the old firm's creditors from asserting their derivative right through the equity of the old firm's members as though the assets had been converted into the separate assets of one member; because, whilst in the latter instance the right would have been lost by reason of the separate creditors being preferred, in the other instance the old firm's creditors' right would have been lost by being either subordinated to the claims of the new firm's creditors, or, by being placed on an equal footing with it. 17 *Am. & Eng. Ency. Law,* 978, 979 and notes 1, 2, 3; *Huiskamp.* v. *Moline Wagon Co.,* 121 U. S. 310.

It is not solely because the transfer by one to another partner converts the joint into separate property that such a transfer is, when the firm is insolvent, prohibited as against the joint creditors; but it is because by such a conversion, if effective, the equity of the joint creditors to have a priority through the lien of the partners would be destroyed. The destruction of this lien and the consequent extinguishment of the creditor's derivative equity, is the injurious act

—it is the detrimental *end*; the transfer itself is merely the *means* by which that end is accomplished. The law levels its inhibition at the means merely because the end worked out by those means is injurious. The results are the things with which it is chiefly concerned. If the equity of the joint creditor is destroyed by a transfer that does not convert joint into separate property, the result to the creditor is precisely the same as though the joint had been converted into separate assets; and it will not do to say that the right of the creditor to relief depends on the *manner* in which the means employed to defeat him may produce their result, rather than on the ultimate fact that he has in reality been defeated by those means. And so whilst a transfer of all his interest by one to two other members of an insolvent firm may not convert what was joint into separate property; it nevertheless does, *if effective at all,* by divesting that property out of the old and vesting it in the new firm, as completely defeat the equity of the old firm's creditors and subordinate that equity to the equity of the creditors of the new firm; or, place the equity of the latter on an equality with that of the former.

We have just said that the transfer by one to two other members of an insolvent firm conveying the retiring partner's interest in the joint property, *if effective at all* as against the creditors of the firm, is prejudicial to their equity. But is such a transfer any more effective when assailed than the transfer from one or more to another member of such a firm would be? In *Collier* v. *Hanna, supra,* we held that a transfer from one to another member of an insolvent firm cannot be upheld against the firm's creditors, and precisely the same conclusion must be reached in the other instance. Thus in *Peyser* v. *Myers,* 135 N. Y. 599, there were two sets of creditors, there was a change in the firm, and in discussing the respective rights of these creditors the Court said: "The priority of the lien of firm creditors is not divested by a transfer by an insolvent firm of the firm assets to *one or more* of the partners, nor can

it be effected, as we conceive, by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm or the introduction of a new member." See also *Phelps* v. *McNealy,* 66 Mo. 554; *Thayer* v. *Humphrey,* 91 Wis. 276; 30 L. R. A. 549.

It was said in the argument that no case could be found where the doctrine announced in *Collier* v. *Hanna* had been applied to the state of facts presented by this record—that is, where a retiring partner had transferred his interest in the social assets to two or more remaining members of the firm. But it is not material whether a parallel case can be cited or not—we are not dealing with precedents, but with principles; and if the legal principle underlying the one state of facts is applicable to and fits the other state of facts, the mere circumstance that no adjudged case actually applying such principle can be produced, furnishes no reason for refusing to make the application when the occasion does arise. But the case of *Peyser* v. *Myers, supra,* distinctly recognizes the doctrine as applicable to such a case as this.

This brings us to the deed of trust, and in the light of what has been just stated we are to determine whether its legal effect is to hinder and delay the creditors of the old firm, and whether, therefore, it is in law fraudulent and invalid as to those creditors. The whole discussion thus far has proceeded upon the theory that the firm of Henderson, Pfeil and Company, was insolvent on October the fourth, eighteen hundred and ninety-five; and what we have said must be understood in that view; and as the ultimate decision of these cases hinges on the question of solvency, we now proceed to consider that question before examining the terms of the deed of trust.

Henderson retired from the old firm on Friday, October the fourth. The new firm took charge at the close of business on that day. They continued in business until Monday the fourteenth, when the deed of trust was made. Excluding the two intervening Sundays—the sixth and the thirteenth—they conducted the business for just *seven* days.

On Saturday the twelfth of October—the last of those seven days—the new firm was, as a matter of fact, no worse off financially that it had been on the preceding fourth of the same month. This is distinctly stated in the evidence of Pfeil and nowhere controverted. On the fourteenth, when the deed of trust was executed, the firm's financial condition had not changed from what it was the prior Saturday. As its condition on the fourteenth was no worse financially than on the fourth, if it was insolvent on the fourteenth it could not have been solvent on the fourth. That it *was* insolvent on the fourteenth is abundantly evident from the recitals in the deed itself and from the statement of its liabilities and assets furnished by the trustee to the creditors. Its liabilities on the fourteenth were over fifty-six thousand dollars; and its actual assets were something over thirty-one thousand dollars—which were afterwards swelled some five thousand dollars by book accounts collected, but were diminished in the neighborhood of three thousand dollars by a sale of the plant at less than the estimated value. Its liabilities were far in excess of its assets when the assignment to Mr. Wolff was made, and it was no worse off financially *then* than when Henderson withdrew ten days previously. Its collapse in seven business days with no cause existing to produce that result other than the demand of some of the old firm's creditors for the payment of overdue debts, conclusively shows that it was utterly insolvent—unable to pay its debts when due and demandable—at the time Henderson retired; especially as at the time the deed was executed the firm was confessedly no worse off financially than it had been on October the fourth. We are convinced, then, that both the old and the new firms were insolvent on October the fourth.

The deed of trust, as we have seen, was signed only by Pfeil and McDonald and made provision solely for the payment of the debts due by the copartnership composed of those two individuals. The quotations we have made from the deed are quite sufficient to show this conclusively.

The deed thus undertakes to treat the assets which the trustee claims under it—and they are largely the assets which belonged to the *old* firm—as the property of the new firm; and it further undertakes to appropriate those assets to the payment of the new firm's debts without the slightest regard to the rights of the creditors of the old firm who are not creditors of the new concern. Had the transfer by Henderson been made by himself and by one other member of the firm to the remaining member, the firm itself being insolvent; and had the purchasing member executed a deed of trust providing for the payment of *his* debts, the deed would, under these circumstances, have been invalid. *Collier* v. *Hanna, supra*; *Gable, Trustee,* v. *Williams,* 59 Md. 53. For the reasons we have already suggested, the mere fact that the transfer by Henderson was made to *two* members of the old firm, does not rescue the deed from condemnation. The deed entirely ignores, and if effect were given to it, it would utterly destroy the privilege or preference to which the creditors of the old firm are entitled, of having the debts due to them paid out of the assets of the old firm; and it would destroy this preference notwithstanding no transfer by any member of an insolvent firm to the other members thereof can be efficacious to defeat the rights of such creditors. The deed expressly dedicates the property conveyed by it to the payment of the creditors of the grantors. This, Pfeil and McDonald had no right to do. The insolvency of the old firm at the time of Henderson's attempted transfer of his interest therein to his copartners prevented that transfer from becoming effective as against the right of the creditors of Henderson, Pfeil and Company to work out their equities through the lien of the partners; and, therefore, did not vest the title in the remaining partners as a *bona fide* sale by a partner of a solvent concern would have done. The transfer by Henderson to Pfeil and McDonald did not clothe the latter with a title which they could by a deed of trust convey for the benefit of *their* creditors alone; and consequently the deed of trust, which by

its terms excludes the creditors of the old firm, is a conveyance that hinders, delays and defrauds those creditors. The deed is, and can therefore be, no barrier to the condemnation of the credits attached in the hands of the trustee.

The *pro forma* order quashing the attachments will be reversed and the cases will be remanded for further proceedings; and it is accordingly so ordered.[2]

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[2] *Compare with this case and the three preceding cases the following:*

A. Where the assignment took place when apparently neither the firm nor the assignee partner was insolvent.

McGown v. *Sprague,* 23 Ala. 524, 1853 (A and B were partners. A retired and sold out his entire interest to B. B left with most of the property and without paying the debts. A brought a bill in equity on behalf of himself and the firm creditors to have a receiver for the property left by B appointed, and for an order to apply such of the property as had been firm property to the payment of firm debts. Granted, one Judge dissenting).

Andrews v. *Mann,* 31 Miss. 322, 1856 (A and B were partners. A sold his interest in partnership property to C, who promised to pay A's portion of partnership debts. C sold the interest thus acquired to B, who used the property to pay his individual debts. A brought his bill against B, C, and the assignee of the goods, to enforce his, A's, lien on them for the payment of firm debts. Bill dismissed).

Coffin v. *McCullough,* 30 Ala. 107, 1857 (A and B were partners. A new partner was added to the firm, and A and B were credited equally on the books of the new firm with the stock of goods on hand as their respective shares in the new firm. A died, and his administrator obtained a decree for his share of the partnership effects. B brought a bill in equity to subject the interest of A's estate in the second firm, to pay the debts of the original firm. Bill dismissed).

B. Where the assignment took place when the firm was solvent but the assignee partner insolvent.

Hapgood v. *Cornwell,* 48 Ill. 64, 1868 (A, B and C were partners. D, trustee for E, the wife of A, had loaned A considerable sums from the trust estate. D, fearing for his loan, suggested to A that he, A, buy out B's and C's interests in the firm and apply the firm property to the payment of the debt due him, D, as trustee. This suggestion was acted on. F, *et al.,* secured a Judgment against the firm and brought a bill against D and the members of the firm to have D pay F, *et al.,* the amount of the Judgment. Bill dismissed).

Stanton v. *Westover,* 101 N. Y. 265, 1886 (A and B were partners. The partnership was solvent. B was insolvent though this fact was unknown to A and B. A assigned his interest in the partnership property to B, B giving A some outside property and A and B each agreeing to pay one-half of the partnership debts. B continued the business for five months, then executed two mortgages on the property assigned to him to secure his individual debts, and subsequently made a general assignment for the benefit of creditors. C, a receiver of the joint property appointed in a proceeding brought by the firm creditors, brought a bill to have all these transactions set aside. Bill dismissed. Finch, J.: "The insolvency of the purchasing partner, if known to him and to the seller, might very well be strong evidence of an intent to defraud the partnership creditors, and become conclusive upon that

question if there was no explanation. But here the purchasing partner supposed himself to be solvent, and was so believed to be by the seller," p. 269).

C. Where assignment took place when the firm, and apparently the individual members thereof, were insolvent, though the insolvency of the firm was not known to the partners.

Allen v. *The Center Valley Co.*, 21 Conn. 130, 1851 (A and B were partners. The assets were not sufficient to pay the debts, but the business was a going one, and the financial condition of the partnership was unknown to the C Co. A and B sold to the C Co. an engine and other property belonging to the firm, A and B each receiving as individuals 40 shares in the C Co. A and B became openly insolvent and stopped business. *Held,* that the firm creditors could not invalidate the sale, nor have the shares regarded as firm assets).

Ex parte Mayou, 4 De J. & Sm. 664, 1865 (A and B were partners. They were each insolvent and the firm was also insolvent. A assigned to B his interest in the firm, B undertaking to pay the firm debts. The firm was declared bankrupt. *Held,* that the transfer was void, and that the assets assigned should be regarded as firm assets. Westbury, L. C.: "My strong impression therefore is that this transaction, had it been made the subject of judicial decision before the statute of bankruptcy which introduced these words, 'fraudulent grant or conveyance of any lands, tenements, goods or chattels with intent to defeat or delay creditors,' would not have been denominated a real, that is a *bona fide* transaction, and therefore would not have been held valid according to the purport of Lord Eldon's judgments in *Ex parte Ruffin* and *Ex parte Williams,* for I regard his references to *bona fides* as being nothing more than a short expression of that principle, which has been expanded more fully into the form now found in the 67th section of the Act of 1849.")

Singer v. *Carpenter,* 125 Ill. 117, 1888 (A, B, *et al.,* were partners. The partnership was insolvent but this fact was unknown to the partners. They entered into an agreement with C, *et al.,* to join with C, *et al.,* in the formation of a corporation, transfer the property of the firm to the corporation, and each receive as individuals shares of stock in the corporation. Before the transaction was completed A died and the shares awarded to him were delivered to his executors, who sold them for the benefit of A's estate. Bill by firm creditors to have proceeds of sale applied to the satisfaction of their claims to the exclusion of the separate creditors of A. Bill dismissed).

D. Where assignment took place when the firm and the individual members were insolvent and the fact of insolvency was known to the partners.

Ransom v. *Van Deventer,* 41 Barb. 307, 1863 (A and B were partners. They were insolvent. A was indebted to the firm in a greater amount than B. The firm sold property to C, who gave his notes. A, to equalize B's indebtedness to the firm permitted B to take one of these notes and give it to D, in payment of a debt owing by B to D. D took the note with knowledge of all the facts. *Held,* that E, a Judgment creditor of the firm, could in equity have the assignment of the note to D set aside, and the proceeds of the note applied to the payment of firm debts.)

Goddard-Peck Grocery Co. v. *McCune,* 122 Mo. 426, 1894 (A and B were partners. A had borrowed his partnership contribution from C and had given C his individual note. The firm was insolvent and this fact was known or suspected by the partners. A and B gave a firm note to C in lieu of A's individual note. Some six months later the firm failed. *Held,* that C was a creditor of the firm; on the ground that the firm assets could have themselves been used to pay the indi-

vidual debts of one of the partners with the consent of all the partners. Barclay, J., concurred on the ground that the consideration given by C was property which had been used by the firm and therefore, there was a meritorious consideration for the firm note).

Compare the following cases in which the individual creditors of the assignor partner objected to the assignment.

Hamill v. *Willett,* 6 Bosw. 533, 1860 (A and B were partners. They dissolved, B assigning all his interest to A, A agreeing to pay the firm debts. A continued in business, used the firm name, and employed B. The property was levied on by C, an individual creditor of B's. *Held,* in an action by A against C to recover possession of the property, that the jury were not justified from the above recited facts in finding that the assignment by B of his interest in the firm property was in fraud of his, B's, individual creditors).

Griffin v. *Cranston,* 10 Bosw. 1, 1862 (A and B were partners in a hotel. A was insolvent, as also the partnership, and A was indebted to the firm in a large amount. A assigned all his interest in the firm to B, B agreeing to pay the firm debts, and also employ A and his wife in the hotel, lodge them, and pay them a share in the profits if any. C, an individual creditor of A's, brought an action against B and A to set aside the assignment. *Held,* that the facts did not show that the assignment was fraudulent as to B's individual creditors, or that the beneficial use of the property granted to B created any trust in the property for B. Judgment for defendants confirmed).

When one partner assigns to another partner his interest in the firm property and the assignee partner covenants to use the firm property to pay the firm debts, a trust in the property assigned is created for the benefit of the partnership creditors.

Wildes v. *Chapman,* 4 Eds. Ch. 669, 1846 (A and B were in partnership, B retired and A covenanted to apply the property of the firm to pay its debts. C, *et al.,* firm creditors, brought bill against D, asserting that A in fraud of the plaintiffs had conveyed the firm property to D; and praying that the property might be applied to the payment of firm debts. Demurrer of D overruled).

In re HEAD.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, 1902.

114 *Federal Reporter*, 489.

IN Bankruptcy. On review of action of referee disallowing exemptions claimed by bankrupts.

ROGERS, District Judge: Clyde Head and Charles P. Smith were merchants at Richmond, Ark., under the firm name and style of Head & Smith. They formed their copartnership and entered into business on the 1st of January, 1901, neither one of the partners having any capital. They purchased the remnants of two small secondhand stocks of goods on credit, and their purchases were subsequently made on credit, and the scope of their business was largely the furnishings of supplies to a large planter near by. They continued in business until the 14th of January, 1902; when they dissolved. Both parties testified that the immediate cause of their dissolution was a notice from said planter that he did not intend to patronize them during the year 1902. The partner Head took for his share 2 horses, 1 buggy, 25 bushels of corn, and some harness; the partner Smith took the merchandise and open accounts, and, indeed, all the other assets of the firm, nominally $4,000, and assumed the debts of the concern, amounting to in the neighborhood of $3,500. Smith testifies that he believed when he took the business that he could carry it on and pay the debts. He at once notified the creditors of the dissolution, and applied for an extension. He failed in that, and on the 7th of February, 1902, creditors filed their petition in bankruptcy against the firm, after both partners had stated in writing that they were insolvent, and expressed a willingness to go into bankruptcy. Head was a single man; Smith married after the partnership was formed, and before it

dissolved. No inventory of the stock was taken when the dissolution took place, but they estimated the stock would invoice at between $4,000 and $4,500. After the dissolution Smith bought some goods, sold others, and paid some small firm debts. Smith had no property except the assets of the dissolved firm, and no means of raising money to pay the creditors except by a sale of the goods. Head testifies that after the firm was dissolved he had no further connection with it; that he thought Smith would be able to take charge of the stock, pay the debts, and continue the business; they neither had any idea of going into bankruptcy; they both thought Smith could make sufficient arrangements to get time and convert the goods into cash; that they estimated the goods would invoice $4,250, and liabilities in the neighborhood of $3,600.

On this state of proof the referee found the partnership was insolvent when the dissolution occurred, and in that finding of facts the Court concurs. If this transaction is upheld, its inevitable effect is that the mere act of the dissolution of the partnership converts all the partnership assets into individual assets of the respective parties, thereby enabling each partner, not only to claim exemptions out of the partnership assets in violation of the exemption laws of Arkansas as construed by its own courts (*Richardson* v. *Adler,* 46 Ark. 43), but also to pay their respective individual creditors out of the partnership assets to the exclusion of the partnership creditors, in plain violation of the express provisions of the bankrupt law (Bankr. Act 1898, § 5). Moreover, its effect is to enable the individual creditors to gain an advantage over the other creditors, which they did not have until the firm was dissolved. It was, in effect, a gift by the insolvent firm to the creditors of the individual members of the firm, and therefore a preference to them over the partnership creditors, who under the bankrupt law and in equity and good conscience were entitled to have the partnership assets appropriated to the payment of the partnership debts, to the exclusion of the

individual creditors of the respective partners. Nor will it do to say that the members of this firm acted in good faith in what they did; that they did not intend to hinder, delay, or defraud their creditors. Every man must be held in law to have intended that which was the necessary and inevitable result of his acts, and the dissolution of an insolvent firm, if valid, is, in effect, an appropriation by the firm of the firm assets, which in equity and under the bankrupt law should be appropriated to the payment of the firm creditors, to the payment of the debts of the individual members thereof. The firm, and the members thereof, must therefore be held to have intended that very result, and this the bankrupt law forbids.

The injustice of such a transaction, and the inequitable nature thereof, is, in the opinion of the Court, in direct conflict with the whole theory of the bankrupt law. I am of the opinion that the dissolution of this firm, it being insolvent, and the withdrawal therefrom of assets by the respective partners, to be held as individual property, was in violation of section 67e, Bankr. Act 1898, and that the Court should set aside the terms of the dissolution, and treat the assets of the firm in the hands of both partners as partnership property, and to do otherwise is to defeat the whole spirit and policy of the bankrupt law. I am not aware that this question has been authoritatively settled by any Court of Appeals or by the Supreme Court of the United States, and there appears to be a conflict of authority upon the subject among the District Courts. In support of the position assumed by the Court may be cited *In re Cook*, Fed. Cas. No. 3,150; *In re Byrne,* Fed. Cas. No. 2,270; *In re Sauthoff,* 21 Fed. Cas. (No. 12,380); Loveland, Bankr. p. 190; Coll. Bankr. (3d Ed.) 70; *In re Jones & Cook,* 4 Am. Bankr. R. 141, 100 Fed. 781; *In re Gillette & Prentice,* 5 Am. Bankr. R. 119, 104 Fed. 769. I am aware that all of these cases are not directly in point, but they bear upon the principle involved.

The case of *In re Rudnick* (C. C.) 102 Fed. 751, is

cited as opposing the conclusion reached by the Court. The cases are not the same, but, if it may be treated as an authority against the conclusion reached by the Court, I am unable to follow it. The action of the referee in disallowing the claim of both bankrupts is affirmed, and an order will be entered accordingly.

The referee will proceed in accordance with this opinion.[1]

[1] The first part of Section 67, subsection e, of the Bankrupt Act of 1890, referred to in the opinion reads as follows: "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

In re DENNING.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, 1902.

114 *Federal Reports,* 219.

IN Bankruptcy.

LOWELL, District Judge: The bankrupt was formerly in partnership with one Brown, doing business under the firm name of Brown & Denning, up to August 22, 1899. On that date they were insolvent, and may be supposed to have known their financial condition. On that date Brown sold all his interest in the partnership to the bankrupt, and received from the bankrupt eight promissory notes, of $100 each, without interest, payable, respectively, in two, three, four, five, six, seven, eight, and nine months. On October 25, 1899, the bankrupt filed his voluntary petition. At that time the firm was indebted to the amount of about $1,100. The assets in the bankrupt's hands were: (a) Proceeds of the sale of the business plant formerly owned by the firm and transferred to the bankrupt as above set forth; (b) proceeds of the collection of debts arising from the sale of goods by the firm; (c) proceeds of a contingent interest in real estate inherited by the bankrupt; (d) money received for goods sold by the bankrupt after the partnership was dissolved. Brown proved the promissory notes above stated without objection. The trustee moved to expunge the claim, which motion the referee allowed, and the claim was expunged. Brown now seeks a review.

It is plain that the bankrupt's former partner cannot be allowed to prove in this case. To permit him to do so would permit him to compete with his own creditors. Under a separate commission like this, joint creditors may prove, and, at the least, they may share in the surplus of the separate estate after payment of the separate debts. There are

joint creditors in this case who have proved, and, until the claims of the joint creditors are settled, Brown cannot share in the distribution of his former partner's estate. Lowell, Bankr. § 133; *Amsinck* v. *Bean,* 22 Wall. 395, 402, 22 L. Ed. 801. There is nothing in section 5g of the act to change this well-established rule.

Certain creditors of the firm seek to prove their claims against the bankrupt individually, and, together with the separate creditors, to share in the estate now in the hands of this Court. If they are to be treated as joint creditors only, and if all the assets are to be treated as separate assets, they will be entitled only to come upon the surplus after payment of the separate debts. *In re Wilcox* (D. C.) 94 Fed. 84. *In re Johnson,* Fed. Cas. No. 7,369, 2 Lowell, 129, it was decided that joint creditors could, even after bankruptcy, so assent to the bankrupt's undertaking to pay the firm debts as to make themselves separate creditors of the bankrupt, and thus to share alike with separate creditors in the separate estate. In the same case it was intimated that the conveyance of the firm assets to one partner was a fraudulent preference, which could be set aside in bankruptcy, and that thus the assets, which originally belonged to the firm, could be brought back into the estate. If both these propositions are true, there will be confusion in working them out together. Each joint creditor will have an election (1) to come with the separate creditors upon the separate estate, including that formerly joint, or (2) to have the assets marshaled, and come with the other joint creditors upon the former joint estate. It seems that a former joint creditor, who has elected to become a separate creditor of the bankrupt, assents to the conversion of the joint into separate assets, and is permitted to come upon the converted estate as a separate creditor. On the other hand, a creditor who procures the avoidance of the conversion and a marshaling of the assets comes as a joint creditor upon the property thus returned to the joint estate, and it is hard to see how accounts can be kept which treat

the same property as joint property for the payment of some claims and as separate property for the payment of others. See St. Mass. 1865, c. 113; *Bucklin* v. *Bucklin,* 97 Mass. 256.

There are considerable difficulties in dealing with joint estate under a separate commission. See *In re Wilcox* (D. C.) 94 Fed. 84. As was there pointed out, courts of bankruptcy at one time permitted the creditors of the bankrupt, whether joint or separate, to come upon all the estate in the assignee's hands, both joint and separate, and share in it alike, unless application was made for a separation of accounts. This application had originally to be made, not to the court of bankruptcy, but to a court of equity. Some courts of bankruptcy in this country have held that the distribution of joint estate among joint creditors, and of separate estate among separate creditors, is confined to cases where the commission is joint. See 94 Fed. 105. The contrary was held by this Court *In re Wilcox,* and the principle was treated as of general application, at least under the provisions of this bankrupt act. The Court has, therefore, to consider if the assets in the bankrupt's hands which came from the firm are to be treated as converted by the transaction of August 22d, or if the conversion was avoided by the adjudication October 25th.

It is somewhat difficult to construe the conversion as a preference within the terms of section 60 of the act. Under section 60 only that is a preference which enables a creditor to obtain a greater percentage of his debts than other creditors of the same class. If creditors are thus classified exclusively with regard to the priorities established by section 64, then the conversion of joint into separate estate is a preference; but it is at least doubtful if joint and separate creditors are "creditors of the same class". If they are not, then the conversion does not enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class. The conversion enables creditors of the separate class to be paid in full, while de-

priving creditors of the joint class of any payment whatsoever. Even in England, however, the rule in *Ex parte Ruffin,* 6 Ves. 119, is subject to an exception where, as here, partnership and partners were insolvent at the time of the conversion. Lindl. Partn. (2d. Ed.) *338. As to the American rule, see Lowell, Bankr. § 139. Moreover, section 5g of the bankrupt act was intended, I believe, to clear up the whole matter, and to permit the Court to deal with conversions of this kind so as not only to prevent preference in the technical meaning of that word, but also so as to "secure the equitable distribution of the property of the several estates." Lowell, Bankr. § 468; *In re Gillette* (D. C.) 104 Fed. 769; *In re Shapiro* (D. C.) 106 Fed. 495. That it is highly inequitable in this case to permit what was joint estate before the dissolution of the partnership to be treated as separate estate in the distribution of the bankrupt's effects is plain. To permit the joint creditors to come, alike with the separate creditors, upon the whole estate, even if admissible, seems to me to cut the knot, rather than to untie it. The trustee should be directed to keep separate accounts, the property belonging to the firm at the time of the dissolution of the partnership on August 22d should be applied first to the payment of the joint debts, and the separate estate of the bankrupt should be applied first to the payment of the separate debts. If there is any surplus in either fund, that is to be distributed as provided in section 5f. It is true that section 5h provides that, if one partner only is adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the other partners; but that provision has plainly no application to the case at bar.

The case is remanded to the referee, with instructions to proceed in accordance with this opinion.[1]

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[1] The pertinent part of Section 60, of the Bankrupt Act of 1898, referred to in the text is as follows: "A person shall be deemed to have given a preference, if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication,* procured or suffered a judgment to be entered

against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The case of *In re Johnson,* Fed. Cas. 7, 369, 1872, arose under the Act of 1867 and was as follows: (A and B were partners. A assigned to B, B promising to pay the debts of the firm. The firm and both partners were insolvent at the time and within four months B brought a voluntary petition in bankruptcy. J. Lowell, District J., said: "The better mode of meeting the difficulty [arising out of the assignment and the resulting absence of a joint fund] seems to me to be to permit the joint creditors to assent to the conversion, and thus to become separate creditors, even after bankruptcy has occurred. The decisions have been tending to this point, though but few have yet reached it. The early cases laid down the rigid rule, that there could be no substitution or conversion by which a joint debt of two partners should become the separate debt of the remaining partner; because there was no consideration for the relinquishment of the responsibility of the retiring partner. *Lodge* v. *Dicas,* 3 Barn. & Ald. 611; *David* v. *Ellice,* 5 Barn. & C. 196. This strict construction, under the guise of protection to the rights of the creditor, really destroyed them, in many cases; and it is now well settled, in England, that if the creditor has assented to the change, whether expressly or by a course of dealing, the debt is severed. *Thompson* v. *Percival,* 5 Barn. & Adol. 925; *Oakeley* v. *Pasheller,* 4 Clark & F. 207; *Hart* v. *Alexander,* 2 Mees. & W. 484; *Lyth* v. *Ault,* 7 Exch. 669; 1 Lindl. Partn. [2d Ed.] 454. In bankruptcy, it is always permitted to a creditor who has assented to the arrangement to prove against the estate of the substituted debtor. Colly. Partn. [5th Am. Ed.], Sec. 918; Robs. Bankr., p. 508. Compare with cases cited *supra, Howe* v. *Lawrence,* note 2.")

SECTION 2.—FRAUD ON THE SEPARATE CREDITORS OF A PARTNER.

JACKSON *v.* CORNELL.

IN THE COURT OF CHANCERY, NEW YORK, 1844.

1 *Sandford's New York Chancery Reports*, 348.

SANDFORD, Assistant Vice-Chancellor: The assignment made by Cornell to the two Farringtons is alleged to be fraudulent, on various grounds. * * * The assignment devoted Cornell's individual property to the payment of the partnership debts due from him and his assignee, in preference to his individual debts. * * *[1]

It is not denied that the rule of equity is uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts, to the exclusion of the creditors of the individual members of the firm; and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything. See *Wilder* v. *Keeler* (3 Paige's R. 167); *Egberts* v. *Wood* (3 *id.* 517); *Payne* v. *Matthews* (6 *id.* 19); *Hutchinson* v. *Smith* (7 *id.* 26); 1 Story's Eq. Jur. 625, § 675.

It is, however, contended that each partner, before a lien attaches by judgment, execution, or creditor's bill, has a right with his individual property, to give such preferences to and amongst his creditors, as he pleases, whether several or partnership creditors.

[1] Only so much of the opinion as relates to the invalidity of such an assignment is reprinted.

This is the principal question in the case, and it is one of great importance in commercial law. The defendant's proposition embraces the right, not merely to pay the money or deliver the property of the individual debtor to the partnership creditor in discharge of his claim; or to secure him with a specific parcel of individual property. But it extends to the general assignment of all the partner's separate estate. And if he may, by such an assignment, prefer one partnership creditor to his own, there is no stopping short of permitting him to prefer all the creditors of the firm to the entire exclusion of the individual creditors. * * *

It is well settled that such a disposition of the separate property of the co-partner is inequitable. It is such an appropriation as this court will not suffer, when by reason of insolvency, the death of a partner, or any other cause, the subject is brought within its jurisdiction.

The vice-chancellor of the eighth circuit has declared that a partner cannot prefer his private debts with the assets of the co-partnership; and the converse of the rule must be equally true. And our learned Chancellor has gone so far as to say that such an assignment, giving a preference to a private debt, could not be sustained, *so far as it provides for the payment of that debt.*

Let me pursue the consequences, in the case of the assignment of the effects of a co-partnership, giving a preference to a private debt.

First.—It is inequitable, and therefore wrong.

In the next place, it cannot be sustained as to the debt so preferred. Now, in what manner is the wrong which the parties have attempted to perpetrate on the creditors of the firm, to be prevented?

Not by a mere appeal to the assignee, for he is to be governed by the express directions of the trust which he has undertaken to execute, and would not feel warranted in deviating from them, without the sanction of the court. Not by a bill by the creditors for the purpose of rectifying this particular grievance, while their demands still rest in

simple contract. The case of *Robb* v. *Stephens* decides that such a bill will not be sustained. And while the creditors are prosecuting their debts to judgment, so as to enable them to exhibit a bill under that decision, a pliant assignee of the debtor's own selection would be very likely to forestall their proceedings by immediately paying off the obnoxious private debt so preferred.

The result of it is, that in order to remedy the evil, it will be necessary for the creditors to resort to this court for an administration of the whole trust. And if they would not wait until such remedy would be fruitless, their resort must be made immediately, and at the expense of the costs. For the assignee is entitled to a reasonable time to wind up his trust, and if the creditors speed him before he has had that time, it will be at their own costs and charges.

On such a bill, the court would doubtless direct the assignee to follow the rule of equity, and to postpone the private debt to all the joint debts.

In my opinion the courts have gone far enough in sustaining assignments, without proceeding to the length that they will sustain one so framed that creditors for whose benefit it professes to be made, are compelled to be at the expense of a chancery suit, to prevent its accomplishing gross injustice, and violating their manifest rights. We permit insolvent debtors to make assignments, selecting their own trustees, and preferring such creditors as they choose, so that one may receive his whole debt, while another equally meritorious, but less favored, loses his whole claim. Before resorting to this *ultimam rationem,* debtors are allowed to make similar preferences by actual payment in money or property, to such as they choose. We go still farther. While the debtor has control of his property, he may take $100 in his hand, and say to the creditor for $1,000, take this and release the debt, or you shall receive nothing. I will assign, and place your debt in the last class which is to be paid. If the creditor accepts the offer, and executes a re-

lease, it is valid, notwithstanding the moral coercion thus exercised over him.

But if the debtor, instead of making this use of his property, places it in the hands of trustees, with a proviso that it shall be paid only to such of his creditors as will accept it and release their debts, the law no longer tolerates the preference. It renders the whole transfer void.

I do not perceive why the same distinction should not prevail in reference to the point under consideration. Let the partner actually apply his own property as he thinks proper, while he administers it himself. But when he avails himself of the lenient provisions of our law, which enable him to prefer such creditors as he pleases, on making an assignment, and to select his own trustee, let us require him to avoid violating the plainest principles of equity. Let us prohibit him from vesting his property upon a trust which this court frowns upon as unrighteous, and which, when invoked, it must enjoin from being executed.

It appears to me that an assignment which attempts to carry out through trustees, a principle which this court will never permit any fiduciary to carry out, is a fraud upon the court, and upon the law which tolerates assignments. And that when such an instrument is made in a form that will inevitably require the interposition of this court in order to prevent gross wrong from resulting, and such a wrong is the intended consequence of its provisions, it is made in fraud of the law, and it should not be permitted to stand.

A party executing an assignment like this, does what he knows is not honest or conscientious. He knows that no court will sanction his directions, and that if invoked, equity will restrain their execution. He knows also that without the expensive resort by his creditors, to a court of equity, his inequitable and dishonest designs will be carried into complete effect. Is not this fraudulent?

It certainly is, in my judgment. I am prepared to say with Judge Van Ness (*Hyslop* v. *Clark,* 14 Johns. 464), that "an insolvent debtor has no right to place his property

in such a situation as to prevent his creditors from taking it, under the process of a court of law, and to drive them into a court of equity where they must encounter great expense and delay, unless it be under very special circumstances, and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution to be made among them all."

What I have said of an assignment by co-partners, preferring their several private debts, is equally true of an assignment by one partner preferring the debts of the co-partnership to the exclusion of his own. The principle of equity is equally operative in the one case as in the other.

If the preference is allowed for a single debt, it is equally valid for all debts. So that a co-partner in order to enrich his associate, if an assignment like this is to be upheld, may assign all his separate property to such associate, in trust to pay the assignor's half of the debts of the firm, and after those are paid, to apply the residue to his private debts. In other words, he may turn his whole private property into the co-partnership, by means of one of these trusts for the benefit of his co-partner, leaving his private creditors penniless.

When the firm is so much insolvent, that all the individual estate of the insolvent co-partner will merely discharge his portion of the co-partnership debts, an assignment made by him giving the preference to the latter, is a direct gift of his property to the other partner.

Suppose, in this case, that Farrington and Cornell owed $5,000 more than their joint means, and that the deficiency on Taylor's mortgage will be the same sum. Cornell, by preferring that deficiency to his own debts, pays out of his separate property the whole deficit of the firm. He saves to his partner, Farrington, by taking it from his own creditors, $5,000, which F., if solvent, would, according to the rule of equity, have to pay out of his own pocket. This is the direct and legitimate consequence of permitting assignments like the one in question. How the partnership

actually stood, the case does not disclose. Cornell was then insolvent, and it appears that eight months afterwards Farrington was in doubtful circumstances. The inference is quite strong that the co-partnership was not much better off than Cornell himself, when he made the assignment. At all events, the joint inference from these facts corroborates the presumption arising from the assignment itself, that it was designed to benefit Farrington, in respect of the co-partnership debts, to the prejudice of Cornell's individual creditors. And I have no hesitation in declaring that, in my opinion, the assignment was for this cause, void as against the latter.

Decreed accordingly.[2]

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[2] *Compare: Collomb* v. *Caldwell,* 16 N. Y. 484, 1857. (The Caldwells, A and B, were partners. They held certain property as tenants in common. Being insolvent, both individually and collectively, they assigned their partnership property and the property held in common for the benefit of the firm creditors, and provided that if any surplus remained it should be returned to them. C, a separate creditor of B, secured a judgment, and then instituted proceedings to set aside the assignment. Comstock, J.: "The Caldwells being insolvent, assigned the estate, which they owned together, to pay the debts which they jointly owed, but one of them also owed debts individually, which were entitled to be paid out of the residue of his share in the fund assigned. Instead of making provision for paying these individual debts, the whole fund was tied up under a trust, and after the particular trusts should be satisfied the residue was reserved to the assignors. It is true, this reservation might not vitiate the assignment, if the fund to which it attached had consisted of partnership property only. The rights of a creditor of one partner are subjected to an equitable adjustment of accounts between the partners themselves, and therefore it may not be fraudulent to provide, in an insolvent partnership assignment, that the surplus of the effects shall be returned to the firm instead of being directed to the payment of the private debts of either of the members. But the real estate assigned by the Caldwells, as we understand the case, was held by them as tenants in common. The interest of each was therefore his individual property, as much so as his separate estate. Thus they had no right to convey in trust with a reservation in their own favor, leaving their individual creditors unprovided for." Pages 486-7. Assignment set aside.)

Gadsden v. *Carson,* 9 Rich. Eq. (S. C.) 252, 1857 (One Carson, being a member of a firm, and insolvent, assigned certain of his individual property in trust to pay firm creditors. Dargan, Ch.: "This misappropriation by the defendant, Carson, of his private assets, to the payment of his copartnership debts, to the postponement, and practically to the entire exclusion of his individual debts, is in violation of the equitable rights of the plaintiff, who is a large separate creditor. To this extent, if no further, he would be entitled to relief." Page 257.)

Smith v. *Howard,* 20 How. Pr. 121, 1859. (A and B were partners. Their individual debts and assets were unequal. Reciting that they were

unable to pay their debts punctually, or in full, they made a general assignment of all their partnership and individual property to pay, first, firm creditors, and second, to pay their separate creditors *pro rata. Held,* that this showed an intention to apply the individual property of one partner to the payment of the separate creditors of the other partner; that this was a fraud which invalidated the whole assignment, and that therefore the assignment could be set aside at the instance of a certain class of firm creditors.)

Gallagher's App., 114 Pa. 353, 1886. (A, being a member of a firm, the day before an assignment for the benefit of creditors, and probably in anticipation of the assignment, confessed judgments in favor of certain firm creditors. Individual creditors asked to have the judgments postponed to individual debts. Request denied. Paxson, J.: "*Jackson* v. *Cornell,* Sandford's 1st Chan. Rep., 348, was cited by appellants as sustaining the position that the assignor could not, by confession of judgment, prefer partnership creditors as against his individual estate. We do not regard it as authority upon the point referred to. The question there arose upon the validity of such a preference in the deed of assignment itself, a thing which would be wholly invalid by our law. And that case recognized the principle contended for by the appellees here, for the Court said: 'Let the partner actually apply his own property as he thinks proper while he administers it himself.' That is precisely what the assignor did in the case at bar. Whilst having full dominion over his property he confessed these judgments. To the extent of giving liens on his real estate he applied it to the payment of certain debts. The assignee took the real estate bound by the judgments and subject to their lien. It is too plain for argument that the proceeds must be applied to their payment. This disposes of the only point in the case." Page 357.)

See also *Purdy* v. *Lacock,* 6 Pa. 490, 1847 (A and B were partners. B confessed a judgment in favor of A to secure a lien for the capital A had put into the firm. C, a separate creditor of B, secured a judgment against B. *Held,* on a feigned issue, that the lien of A's judgment was ahead of the lien of B's judgment.)

Thompson's App., 3 Walk. (Pa.) 345, 1883. (B and C were partners. B confessed judgment to B and C for money advanced for him by the firm. A subsequently obtained a judgment against B. *Held,* that B had a right to admit his liabilities to the firm, waive technicalities, and by confessing judgment create a lien in favor of his firm on his individual real estate, and that therefore the lien of the firm's judgment was ahead of the lien of A's judgment.)

SECTION 3.—FRAUD ON THE CREDITORS OF A CORPORATION.

NAYLOR *v.* BROWN.

IN THE HIGH COURT OF CHANCERY, BEFORE LORD NOTTINGHAM, 1673.

Finch's Reports, RC.

The plaintiff Naylor having lent the Company of Woodmongers £500 they gave him a bond of the penalty of £1000 under their common seal, conditioned for the payment of £500 and interest, and the said company assigned another bond of £1000 due to them, and this was to Sir William Wild for the payment of some of their debts, and Sir William declared the trust as to £620. Parcel thereof for Sir Edmund-Bury Godfrey, and for twelve others therein named, and the rest for several members of the company.

Afterwards a *Quo Warranto* was brought against this company, and they were dissolved, having forfeited their charter, and then they parted stakes amongst themselves, and some few others carving large shares out of their whole estate to some of their own members, who pretended great debts due to them; and left the plaintiff Naylor's debt, and some other creditors, who were not plaintiff's unsatisfied.

The Court upon hearing this cause did not approve these preceedings of the company towards their creditors, especially towards such who were not members of the company, with whom they dealt, as bankrupts usually do, who knowing they shall break, pay such friends as they like best.

And it appearing that the company had borrowed more of strangers than the said £1000 would reimburse, (of which the plaintiff Naylor's debt of £5000 was part) the distribution

of that sum amongst particular members of the company was injurious to such creditors who were not members thereof; it being more reasonable, that of losses must fall upon the creditors, such losses should be borne by those who were members of the company, who best knew their estates and credit, and not by strangers who were drawn in to trust the company upon the credit and countenance it had from such particular members; and which in this case was more remarkable, because several of the principal members of the company had set their names to the plaintiff's bond of £500 under the common seal, which though it did not legally bind them in their private capacities, yet it was certainly an inducement to the plaintiffs to lend their money.

The Court was of opinion that the declaration of the trust by Sir Wm. Wild was utterly void as to the said £620 for that the corporation did not join therein, nor give him any authority under their common seal, or by any corporate act to make such a declaration.

And therefore decreed that the defendant Sir Ed. Bury-Godfrey and the other defendants members of the said company, who have received any part of the said £620 by virtue of such declaration of trust, do pay back the same with interest; it being in equity still, a part of the estate of the late company, and that for this purpose they come to an account before a master, and that the plaintiff's debts be first paid together with damages and costs, so far as the estate of the late company will extend, and that if that estate shall not be sufficient, then the debts are to be paid in proportion, etc.

WOOD *v.* DUMMER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE, 1824.

3 Mason's Reports, 308.

Bill in equity brought by the plaintiffs, as holders of the bank notes of the Hallowell and Augusta bank, against the defendants, as stockholders in the same bank, for payment of the same notes upon the ground of an asserted fraudulent division of the capital stock of the bank by the stockholders. The defendants put in answers, denying the fraud, but admitting the division of the capital stock, &c.; and denying the plaintiffs' title to relief. The general replication was filed, and the cause was set down for a hearing upon the whole merits, at the last October term of the Court, upon certain admissions of the parties, and was argued by Alden and Whitman for the plaintiffs, and by Bond and Longfellow for the defendants. And at this term the opinion of the Court was delivered in substance at follows:

STORY, *J.* The Hallowell and Augusta bank was incorproated in March 1804, by the Legislature of Massachusetts, with a capital stock of $200,000, divided into shares of $100 each, for a term which expired on the first Monday of October 1812, with the usual rights and privileges belonging to the banks in the same state. In June 1812, the Legislature passed an act [act of 1812, ch. 57] continuing all the banks, whose charters would expire on the first Monday of October 1812, as corporate bodies until the first Monday of October 1816, "for the sole purpose of enabling said banks gradually to settle and close their concerns, and divide their capital stock." And by a further act, passed in December 1816 (act of 1816, ch. 110), the term was prolonged for three years from the passing of this last act. In January 1813, at a meeting of the stockholders of the *Hallowell and*

Augusta bank, a vote was passed, ordering a dividend to be made among the stockholders of the bank of fifty *per cent.* of the capital stock thereof; and in October in the same year, a vote was passed for a further dividend of twenty-five *per cent.* of the capital stock, making in the whole a dividend of seventy-five *per cent.* of the whole capital stock among the stockholders. The notes of the bank continued to circulate in good credit until after November 1814; and the plaintiffs were, in October and November 1814, owners in their several rights of notes of the same bank to a sum in the aggregate amounting to more than $29,000, which were presented for payment to the bank, and payment refused. The plaintiffs received certain notes of the directors as collateral security, but these were never paid. In fact one quarter part of the capital stock of the bank had never been paid in, but was secured by the notes of the stockholders, called stock notes; and about $90,000 of debts (beside stock notes) were due from certain directors of the bank, who became insolvent and utterly unable to pay the same. So that nearly three-quarters of the stock was lost or unpaid, either from insolvency or some other cause, and left the bank involved, after the division of its stock, in deep insolvency. In June 1812, another and new bank was incorporated, composed in part of the same persons, with the same corporate name. The new bank, for a considerable time, continued to give credit to, and circulate the notes of the old bank; and the bill asserted the new bank to have become possessed of the funds of the old bank to a very large amount.

Such are the principal facts; and the claim of the plaintiffs is to be reimbursed by the defendants, (who are owners of three hundred and twenty shares) out of the dividends of the capital stock received by them, the amount of the debts so due to the plaintiffs respectively, for the bank notes above stated.

The case is full of difficulties. The bill is drawn in a very loose and inartificial manner. It proceeds principally

upon the grounds of a gross over issue of bank notes, and other violations of the charter, and of a fraudulent dividend by the stockholders with a knowledge of their insolvency; grounds which are denied by the answers, and are not in the slightest degree established in the proofs. It does not directly proceed upon the ground, that the defendants hold a trust fund applicable to the payment of the debts of the corporation; but leaves this to be picked up in fragments by a minute analysis of the bill. I pass, however, over these objections, for the purpose of considering that, which is the principal point argued in the cause, whether the capital stock in the hands of the stockholders is liable to the payment of the debts of the bank.

It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public, as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt, that the charters of our banks make the capital stock a trust fund

for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it; and the stockholders have no rights, until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and cannot take any portion of the fund, until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. On a dissolution of the corporation, the bill-holders and the stockholders have each equitable claims, but those of the bill-holders possess, as I conceive, a prior exclusive equity. The same doctrine has been recognized by the Supreme Court of Massachusetts, in *Vose* v. *Grant* (15 Mass. R. 505, 517, 522), and *Spear* v. *Grant* (16 Mass. R. 9, 15).

If I am right in this position, the principal difficulty in the cause is overcome. If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any persons, having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretence to say, that, both in law and fact, they are not affected with the most ample notice.

The doctrine of following trust funds into the hands of any persons, who are not innocent purchasers, or do not otherwise possess superior equities, has been long established. Lord *Redesdale*, in *Adair* v. *Shaw* (1 Sch. & Lef. 243, 262), lays it down in very broad terms. He says, "if we advert to the cases on this subject, we shall find, that trusts are enforced not only against those persons, who rightfully are possessed of the trust property, as trustees, but also against all persons, who come into possession of the property bound by the trust with notice of the trust; and whoever comes so into possession, is considered as bound with respect to that special property to the execution of the trust." And a very strong recognition, as well as application of the principle, will be found in *Taylor* v. *Plumer* (3 Maule & Selw. 562, 574,) even in a court of common law. Upon this ground,

assets disposed of by executors by misapplication, or existing in the hands of debtors, where the executor is insolvent, or there is collusion, are often reached in favor of creditors, as a trust fund. *Hill* v. *Simpson* (7 Vez. 162), and the cases there cited fully illustrate this position. The cases of partnership furnish also a pretty strong analogy. There, in equity, partnership funds will be followed in favor of creditors into the hands of third persons. It is true, that, as the master of the rolls said in *Campbell* v. *Mullett* (2 Swanston R. 550, 575), the equities of creditors are to be worked out through the medium of the partners. They have no lien, but something approaching to a lien, which courts of equity will regard and enforce, in all cases, where superior rights, which ought to be protected, do not intervene. It is not, however, necessary to search for analogous cases; for upon the plain import of the charter, the capital stock is a trust fund for creditors, and the stockholders, upon the division, take it subject to all equities attached to it. They are, to all intents and purposes, privies to the trust, and receive it *cum onere*. * * *[1]

The next question is, what sort of decree the plaintiffs are entitled to. Are they entitled to a decree, to the full amount of the dividends received by the defendants respectively, towards payment of the debts due from the bank to them, or are they entitled only to a *pro rata* payment out of that dividend, in the proportion, which the stock, held by the defendants, bears to the whole capital stock?

The bill does not allege, that the other stockholders, who have received dividends, are insolvent, or not of the jurisdiction of the Court. Nor does it state what the amount of the debts due from the bank to bill-holders, or others, is. It would have been desirable, as far as it was practicable, that all the other creditors, who had a common interest, might

[1] The Court's discussion of questions of equity practice are omitted. Judge Story decided, that as it was impossible to make all the creditors and all the stockholders parties, the bill could be maintained by some of the creditors against some of the stockholders.

have been brought before the Court. But neither party has urged it, or waived any formal objection to the introduction of them. The Court, therefore, in proceeding to do equity to those before it, must take care, that it is not the instrument of injustice to others, who are not represented. *Non constat,* if the whole fund is taken from the defendants in favor of the plaintiffs, that there will remain any solvent stockholders, from whom the other creditors can claim any share. It is true, in the case of the *City of London* v. *Richmond* (2 Vern. 421; 1 Bro. Par. Cas. 518), that, though all the parties in interest were not before the Court, the full rent was decreed. But that case furnishes no rule for the present, for there the trustees of all the share-holders were before the Court, and they were the assignees of the estate, and therefore held it liable to the rent. In the anonymous case in 2 Eq. Ca. Abr. 166, pl. 7, the decree was only for a proportion of the money expended. But, there, the bill asked for no more. I rather incline to think, that the judges in the cases in 15 Mass. R. 505, & 16 Mass. R. 9, meant to indicate an opinion in favor of the bill-holders only for a proportion, unless special circumstances were made out, such as insolvency, &c.

What would be the effect of the introduction of an averment of the insolvency of the other stockholders, or their being out of the jurisdiction, or of other circumstances denoting a peculiar equity, in a bill of this nature, it is not now necessary to decide. Taking into consideration the manifest defects of the present bill, the long delay in instituting the present suit (which is not accounted for in any averments framed for this pupose), the possible, nay, probable intermediate insolvencies of some of the stockholders, the injustice, which may arise to other creditors of the bank, not before the Court, by any other course, I have come to the conclusion, that our duty is best performed by holding the plaintiffs entitled to a decree, that the defendants pay out of the dividends of the capital stock received by them, so much of the

debts due to the plaintiffs, as the number of shares held by them in the same capital stock (viz. 320 shares) bears to the whole number of shares in the capital stock (viz. 2000 shares).

There is much force in the suggestion, that the corporation books have been withdrawn and secreted, so that the plaintiffs were unable originally to ascertain who the other stockholders were. But this difficulty might, in some measure, have been overcome by apt averments in the bill; and the disclosure of the names of several stockholders in the answers puts the plaintiffs in possession of facts, by which, at their choice, they might by an amendment have brought those persons before the Court, or have assigned a sufficient reason for the omission.

My judgment accordingly is, that the defendants are to pay the plaintiffs, in the proportion already intimated, and no further.

Decree accordingly with costs.[2]

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[2] *Compare: Bartlett* v. *Drew*, 57 N. Y. 587, 1874. (The B Co. was a New Jersey corporation. C was a large stockholder and president of the board of trustees. The Company sold certain boats owned by it, and distributed the proceeds among its stockholders, C receiving his share. A recovered a judgment against the Company and issued execution which was returned *nulla bona*. A brought an action in the nature of a creditor's bill against C to reach C's share in the proceeds of the sale of the boat, which share was much larger than the amount of A's Judgment. Decree that C be required to pay A's Judgment affirmed, the Court being of the opinion that as this was not a bill to wind up the Company it was unnecessary for C to make the other creditors parties plaintiff; that this was merely a proceeding to reach, in equity the property of a debtor, and, therefore, that C had nothing to do with the equities between the stockholders, but could collect his whole debt from C).

Osgood v. *Laytin*, 3 Keye's [N. Y.], 521, 1867. (A statute provided that the receiver of an insolvent corporation might, for the benefit of creditors, treat as void, and resist all acts done in fraud of the rights of any creditor. A was appointed receiver of a corporation. He brought a bill in equity against the stockholders, alleging that they had been paid a dividend when the Company was insolvent, and demanding a decree against the stockholders severally for the amounts they had received. The defendant's demurrer was overruled. The Court was of opinion that no action would lie at common law against a stockholder by any one creditor. Such action, however, can be given by statute. For a case in which a Judgment creditor of a company brought, under a statute, a suit against a stockholder for the amount of the dividend he had been paid when the company was insolvent, see *American Steel & Wire Co.* v. *Eddy*, 89 N. W. 952 [Mich.], 1902).

CATLIN *v.* THE EAGLE BANK.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, 1826.

6 Connecticut Reports, 233.

This was a bill in chancery.

The *Eagle Bank* is a corporation, established by an act of the legislature, in *October,* 1811, for banking purposes, with the usual powers of such an institution; the charter being, at all times, subject to alteration, amendment or revocation by the General Assembly. The plaintiff is a creditor of this corporation to the amount of between 90,000 and 100,000 dollars. The bank, on the 15th *September,* 1825, failed, and was in fact insolvent. Among its creditors was *The Savings Bank of New Haven,* a corporation empowered to receive deposits from individuals, for safe-keeping and management, and obliged to pay the depositors the interest or profits that should accrue. This institution had deposited with the *Eagle Bank,* at an interest of four *per cent.,* and to be returned on demand, all the money which it had received, in small sums, from a great multitude of depositors, amounting to between 80,000 and 90,000 dollars. In payment and security of this demand, the directors of the *Eagle Bank,* after its actual insolvency, mortgaged to the *Savings Bank* real estate worth about 20,000 dollars paid to *Samuel J. Hitchcock, Esq.,* secretary of the Savings Bank, about 15,000 in money, and assigned to him sundry negotiable promissory notes, to the amount of about 52,000 dollars. The bill prayed that these conveyances might be set aside, and that all the funds of the *Eagle Bank,* at the time of its failure, might be equitably distributed among its creditors, in proportion to to their respective claims.

The case was reserved for the advice of this Court.[1]

HOSMER, *Ch. J.* It is an undoubted principle, that the

[1] The Reporter's notes of the arguments of Counsel are omitted.

powers of a corporation are solely derived from its charter, which is the law of its nature; and that it is invested with such powers only as are expressly delegated, or which are necessary, to carry the express delegations into effect. *The New York Firemen Insurance Company* v. *Ely* & al. 5 *Conn. Rep.* 560. By the act of incorporation, the *Eagle Bank* had authority to purchase, hold and convey property, with the usual banking powers superadded; and the directors of the bank were authorized to dispose of and manage its monies, credits and property, and to regulate its concerns, in all cases, not specially provided for. To this general grant, in relation to the rights, privileges and duration of the bank, there is neither exception nor limitation, save that the charter is alterable, amendable, and revocable, at the pleasure of the legislature. It results, undeniably, that the rights, powers and duties of the bank, so far as they depend on the act of incorporation, remain unchanged, until it is revoked, and independent of its actual solvency or insolvency. The general laws of the land, or the principles which guide this Court, as a court of chancery, may make a difference on this subject; but setting aside these considerations, and admitting the operation of the charter exclusively, the bank is authorized to exercise the same powers, at all times, without reference to its condition.

Whether the directors of the corporation, after it has become actually insolvent, can make payment or give security to one of its creditors, and leave another unpaid and without security, is the general question to be determined. It has been contended, in behalf of the plaintiff, with no inconsiderable ingenuity, that the legislature intended to render the corporation at all times a trustee for the creditors. This suggestion is too unfounded, and too destitute of practical importance, to be admitted or discussed. Such a principle, during the solvency of the bank, must be dormant and useless; and neither the charter, nor the nature of the case, furnishes any warrant for the supposition.

If the corporation, so far as regards its right to manage and dispose of its property, has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. An individual debtor, who is actually insolvent, may prefer one creditor to another, unless in certain cases under the bankrupt laws; and to do this, as was said by Lord *Kenyon,* is neither illegal nor immoral. We have no bankrupt system, to control the acts of the insolvent merchant; and in the absence of all legal liens, he may prefer a creditor, if the act is done in good faith. To discuss the reasons of the rule is unnecessary. It is sufficient to say to those, who are not disposed to unsettle foundations, that it is firmly and uniformly established, both at law and in chancery. *Estwick* v. *Cailland,* 5 *Term Rep.* 420. *Nunn* v. *Wilsmore,* 8 *Term Rep.* 521. *Hopkins* v. *Gray,* 7 *Mod. Rep.* 139. *Meux* & al. v. *Howell* & *al.,* 4 *East* 1. *McMenomy* & al. v. *Ferrers,* 3 *Johns. Rep.* 84. *Willes* & al. v. *Ferris,* 5 *Johns. Rep.* 344. *Small* v. *Oudley,* 2 *P. Wms.* 427. *Cock* v. *Goodfellow,* 10 *Mod. Rep.* 489. *Phoenix* v. *Assignees of Ingraham,* 5 *Johns. Rep.* 412, 426, 427. *Hendrick* v. *Robinson,* 2 *Johns. Ch. Rep.* 283. The same rule is equally applicable to partners; and what is a banking corporation, in the essence, but a partnership authorized by a special act of the legislature? *Gow* on *Part.* 234. It is *an artificial person;* and this denomination is given to it, by reason of its resemblance to a natural person, in respect to its powers, rights and legal duties. It is difficult for me to conceive, where no restraint is interposed, in a charter of incorporation, on what ground the general authority delegated is subjected to exceptions, or fettered by restrictions, from which an individual and a mercantile company are free. And this difficulty is much increased, as no case intimating this diversity between corporations and individuals, has been cited, nor can be found, by my utmost researches. Where no legal lien has been obtained, it is a reasonable supposition, that the relation

of creditor and debtor, must, in all cases, infer the same consequences; and that where the same mischief exists, there is the same law. The cases of an individual and of a corporation, in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason for the slightest difference between them. There exists no doubt, that there have been many instances of actually insolvent corporations, where certain creditors have been preferred to others; and the perfect silence until now, on the subject of this fancied diversity, is powerful to show what has been the universal opinion.

It however has been insisted for the plaintiff, that on the actual insolvency of the bank, the corporation were the *trustees* of the creditors; and if this be true, the latter become the *cestuy que trusts* of all the corporate estate. The consequence, on this supposition, would be, that all persons coming into possession of the bank property, with notice of the trust, must be considered as trustees. *Daniels* v. *Davison,* 16 *Ves. jun.* 249. *Moore* v. *Butler,* 1 *Scho. & Lef.* 262. No express trust was created, on the happening of the bank's insolvency; but the charter, on every fair principle of construction, conferred on the corporation the entire control of its property, as well after as before this event.

It however has been imagined, that the trusts arose by operation of law. I enquire of what law? No principle, or case, or analogy has been referred to, that supports the proposition, nor am I capable of conceiving any. The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trust arises. Undoubtedly, in all cases of actual insolvency, the creditor would derive security from this doctrine; and often great losses might be prevented. But the interest of the insolvent person is not to be entirely disregarded. His creditor has voluntarily become such with full knowledge, that his se-

curity must very much depend on the integrity of his debtor. With open eyes he has given credit, and the public charter of the corporation has instructed him in all the powers and rights of the corporation. Now, it would be a very harsh and inequitable doctrine, but on the plaintiff's claim, it is inevitable, that the moment a banking institution is unable to pay all its debts, the directors of the bank may not issue a bank bill, dispose of bank property, make payment of a single debt, or perform one bank operation. May not an individual, or mercantile company, under the same circumstances, proceed in the usual train of business? This is not disputed. It is the law of chancery, that they may prefer one creditor to another; and this, on a principle of analogy, refutes, entirely, the supposition of a trust in this case. The novelty and unfoundedness of the plaintiff's claim are such that it is difficult to support, or even to oppose it, without taking leave of every established principle, and beating the air. That the directors of the Eagle Bank are trustees, I admit; but they are the trustees of the stockholders. The stockholders are the *cestuy que* trusts, and the charge of breach of trust must come from them. *The Attorney General* v. *The Utica Insurance Company, 2 Johns. Ch. Rep.* 371, 385.

The funds of the corporation, after its insolvency, have been called *equitable assets;* but the name was wholly misapplied. Equitable assets, generally speaking, are such as the debtor has made subject to his debts generally, that would not thus be subjected without his act; (*2 Fonb. Eq.* 402, n. d.) and which can be reached only by the aid of a court of equity. They are divisible among the creditors, as all property is, when placed under the jurisdiction of a court of chancery, *pari passu,* in ratable proportions. *Riggs* & al. v. *Murray* & al.,*2 Johns. Ch. Rep.* 565, 577. But they must be assets, or they cannot be equitable assets; and this term does not express the nature of property, in the hands of an individual, partnership or corporation actually in-

solvent. On the estate of such persons, there is no equitable lien to interrupt the free progress of their business, or prevent the fair disposition of their property. The case of *Benson* v. *Le Roy,* 4 *Johns. Ch. Rep.* 651, cited for the plaintiff, illustrates the principles advanced. It proves only that a devise of an estate to trustees, in trust to pay debts, and distribute the residue, places the assets under the jurisdiction of the court. Undoubtedly, it does; for by the express appointment of the devisee, the estate was a trust estate.

There is a class of cases, in which chancery has exercised a control over corporations, in relation to breaches of trust; but in such cases, the jurisdiction has alone been extended to *charitable* institutions. *Shaw* v. *Cunliffe,* 4 *Bro. Ch. Rep.* 145. *Ball* v. *Montgomery, 2 Ves.* jun. 199. In *The King* v. *Watson* & al. 2 *Term Rep.* 199, the court, however, intimated, without discussion, if any corporation misapplied monies, that it was an abuse of trust, which might be the subject of application to the court of chancery. This case has been doubted, by Lord *Eldon,* in *Attorney General* v. *Carmarthen, Coop. Eq. Rep.* 30., and in commenting upon it, it was observed, by the late Chancellor *Kent,* that the chancery cases do not recognize any such general jurisdiction. *Attorney General* v. *Utica Insurance Co.* 2 *Johns. Ch. Rep.* 384. In the case of *Adley* v. *The Whitstable Company, 7 Ves.* jun. 315, Lord *Eldon,* with hesitancy, admitted a jurisdiction in equity against a corporation, by ordering an account of profits, when, by an illegal by-law, the plaintiff was excluded from a share of them. This, it will be observed, was merely an equitable interposition, between the persons interested in certain profits, and does not at all support the principle that chancery, in behalf of a creditor, will take cognizance of corporate funds misapplied. In *Vose* v. *Grant,* 15 *Mass. Rep.* 505, an action on the case was brought by a bill-holder, to recover a sum of money of the defendant, as a stockholder

and director of a bank; the stockholders of the bank having divided their capital stock among themselves, so that the corporate funds were insufficient to redeem the outstanding notes and bills. The action was not sustained by the court; and in giving his opinion, it was said by *Jackson,* J., that a court of chancery would probably give relief against the stockholders. This *obiter dictum* of a learned judge, on a point not made or discussed, and without the citation of principle or case, was not intended to express any thing more, than the first impression of his mind; and this is clearly manifested by the word "probably," with which the intimation was accompanied. On the other hand, in the *Attorney-General* v. *The Corporation of Carmarthen, Coop. Eq. Rep.* 30, the jurisdiction was denied, by the chancellor, in the very case of a misapplication of funds. And in the *Mayor and Commonalty of Colchester* v. *Lowton,* 1 *Ves. & Bea.* 226, Lord *Eldon* held, that there was no instance of a trust attaching, upon the ground of a misapplication of funds by corporations, except in the case of corporations holding to *charitable* uses.

From this discussion it is unquestionable, that the jurisdiction of chancery does not extend to the disposal of the corporate estate or funds of the *Eagle Bank.* More time has been occupied in the examination of the principle, than perhaps can be justified, as it has no application to the case before us. The bank has, in no proper sense, misapplied its funds. It has done what it had a right to do, and what is uncontrollable by this Court; that is, it has preferred to pay and secure the claim of what was considered a meritorious creditor. Of its creditors, the corporation was not a trustee; they had no lien upon its funds; and no case is made out, entitling the plaintiff to relief, or showing any jurisdiction exercisable by this Court.

The plaintiff's bill must be dismissed.

ROUSE *v.* MERCHANTS' NATIONAL BANK.

IN THE SUPREME COURT OF OHIO, 1889.

46 Ohio State Reports, 493[1]

WILLIAMS, *J.* The general question for decision in this case, is, however a corporation for profit, organized under the laws of this state, can, in the disposition of the corporation property, after it has become insolvent, and ceased to further prosecute the objects for which it was created, prefer some of its creditors over others.

The claim of the plaintiff in error is, that when the corporation becomes insolvent and ceases to carry on business, its property and assets constitute a trust fund for the benefit of its creditors, and the directors in possession of the corporation property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all the corporates creditors. The defendant in error, on the other hand contends, that when not restricted by the law of their creation, or prevented by the operation of some bankrupt or insolvent law, insolvent corporations may, the same as natural persons, make preferences among their creditors.

Decisions of courts will be found, maintaining each of these diverse positions. The precise question has not been decided in this state, and in view of the conflict of authority elsewhere, we are at liberty to adopt that rule, which best harmonizes with the policy and legislation of the state, rests upon the sounder reason, as we conceive it to be, and coincides with our sense of justice and right.

The right of the individual debtor to prefer one creditor to another, though at the time insolvent, rests upon his complete dominion over, and consequent unrestricted power of

[1] The Reporter's statement of the facts of the case, and his notes of the arguments of counsel are omitted.

disposition of his property. And the cases which hold that insolvent corporations are entitled to make preferences among their creditors, attribute to them, the same unlimited control over their property that is possessed by individuals over theirs. In *Catlin* v. *Eagle Bank of New Haven,* 6 Conn. 233, which is the leading case in this country maintaining the right of an insolvent corporation to prefer one or more of its creditors over others, the decision is distinctly placed upon the ground that the particular corporation was invested with the control, and power to dispose of the corporate property, as fully and to the same extent that natural persons have with respect to their property. Hosmer, C. J., in the opinion in that case, says: "If the corporation, so far as regards its right to manage and dispose of its property, has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. * * * The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analagous, but identical; and I discern no reason for the slightest difference between them." And again he says that "no express trust was created on the happening of the bank's insolvency; *but the charter,* on every fair principle of construction, conferred on the corporation the entire control of its property, as *well after, as before this event.* * * * "The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trust arises."

We have not the charter of the corporation in question in that case before us, but we assume that the learned Judge was correct in saying that by every fair construction, it conferred upon the corporation the entire control of its property after its insolvency; if so, no fault need be found with his conclusion, that it might, like any individual, prefer some of its creditors over others.

Corporations generally do not possess such amplified

powers, and especially those created under the laws of this state. In this state, corporations have not the same powers and capacities as natural persons, but are authorized for specified and defined purposes. They are clothed with those attributes only, with which the law, under which they are created, invests them, and can exercise no powers not expressly conferred, or necessary to carry into effect those in terms granted.

Since the constitution of 1851, it has been the settled policy of this state, to afford adequate protection to the creditors of corporations. That constitution contains the provision that "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Legislation, under this constitution has been shaped to fully effectuate the constitutional guarantee. All corporations organized for profit, are required to have a capital stock, fifty per cent. of which must be subscribed, and at least ten per cent. paid in, before the organization can be effected and; and the stockholders are made liable, in addition to their stock, to an amount equal to the stock held by them, to secure the payment of the debts of the corporation. This liability it has uniformly been held by this court, is a security exclusively for the benefit of the creditors of the corporation, over which the corporation has no control; and, moreover, the security is for the equal benefit of all the creditors. The suit to enforce it must be by all the creditors, and against all the stockholders; and no creditor can acquire priority over the others, with respect to it. And, while power is conferred on corporations to reduce their capital stock, it is expressly provided that the rights of creditors shall not be affected, nor in any way impaired. The corporate powers, business and property of the corporation, must be exercised,

conducted and controlled by a board of directors, all of whom must be stockholders; and, as a still further guarantee for creditors, the powers of corporations over their property, its use and disposition, are so circumscribed by positive statute that no corporation can employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation. The extent of the powers expressly conferred on them are, to sue and be sued, contract and be contracted with, and acquire and convey such real and personal estate as may be necessary or convenient to carry into effect the objects of the incorporation, to make and use a common seal, and do all needful acts to carry into effect the objects for which they are created. It is obvious, that the corporate property, can not with propriety be said to be owned by the corporation, in the sense of ownership as applied to property belonging to natural persons. The latter may without restriction, acquire and dispose of property for any lawful purpose, while both the power of acquisition and disposition of the former, are limited to the special objects already mentioned. The corporate property is in reality a fund set apart to be used only in the attainment of the objects for which the corporation was created, and it can not lawfully be diverted to any other purpose. As soon as acquired, it becomes impressed with the character of a trust fund for that purpose and the shareholder or creditor may interpose to prevent its diversion from the objects of the incorporation, injurious to him. *Taylor on Private Corporations,* sec. 34.

The custody and control of the property, and the management of the business of the corporation, are confided to a board of directors chosen by the shareholders. Into the hands of these officers, through whom alone corporations can act, the shareholders surrender their funds, and entrust the management of the affairs and property of the corporation to them. A relation of trust and confidence, therefore, arises between the stockholders and directors of a corpora-

tion, out of which grow the duties of the latter, to so administer the trust as will best promote the interests of the former, to pay them their appropriate dividends from time to time, and upon the termination of the corporation, to distribute to them their respective shares of the corporate property, after the payment of its debts and liabilities. These duties are eminently of a fiduciary nature. It is now so well established as to be no longer a subject of controversy, that the relation of trustee and *cestui que trust* subsists between the directors and shareholders. And since the directors, as such trustees, represent and act for all the shareholders, they cannot lawfully favor any particular shareholder or class of shareholders, but every authority and power possessed by them, must be exercised for the benefit of all alike. Otherwise, no corporation could endure. If the directors and officers of a corporation were allowed, in the conduct of the business, and disposition of the property, to favor one or more shareholders to the detriment of the others, the minority would be the prey of the majority; for, it would then be within the power of the majority to combine and elect the officers, who in turn should manage the whole business and apply the whole corporate property for the benefit of the majority, and thus practically confiscate the entire property interest of the minority. Corporations would thus become traps for the unwary, and legalized instruments of fraud. The doctrine that the directors are trustees for the shareholders, and for the equal benefit of all, it is obvious, is essential to the existence of corporations.

But, it is the right of the creditors, equally with the shareholders, to have the corporate property applied to the purposes for which the corporation was created, and this includes the payment of the corporate indebtedness contracted in the prosecution of its business. The rights of the creditors to the corporate property, so far as it is necessary to meet their demands, are superior to those of stockholders.

In *Perry on Trusts*, sec. 242, the relative rights of the creditors and shareholders are thus defined: "A corporation holds its property in trust, *first* to pay its creditors, and *second* to distribute to its stockholders *pro rata*. If, therefore, a corporation should dissolve, and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom the property had come, into trustees, and would compel them to account for the property and contribute to the payment of the debts of the corporation to the extent of its property in their hands."

It is now firmly established, that the property and assets of a corporation are a trust fund for the payment of its debts, especially in case of its insolvency. Since the case of *Wood* v. *Dummer*, 3 Mason, 311, where Mr. Justice Story is said to have first formulated the doctrine, it has been generally accepted, and is sustained by the highest authority. Mr. Justice Swayne announces it with great clearness in *Sanger* v. *Upton*, 91 U. S. 56, 60, as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liabilities which subsist in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation, for their security." In *Curran* v. *State of Arkansas*, 15 How. 312, Mr. Justice Curtis said on this subject. "The capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of its creditors and stockhold-

ers, and a court of equity will lay hold of the fund, and see that it be duly collected and applied." And in *Upton, assignee* v. *Tribilcock,* 91 U. S. 45, 47, Mr. Justice Hunt thus lays down the doctrine: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and can not be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts." The doctrine is sustained by many authorities: 2 Story's Eq. sec. 1252; Pomeroy's Eq., sec. 1046; Taylor on Private Corp., sec. 654, 655; *Haywood* v. *The Lincoln Lumber Co.,* 64 Wis. 639. It was held by this court, as early as *Taylor* v. *Miami Exporting Co.,* 5 Ohio, 165, where the opinion of Mr. Justice Story in *Wood* v. *Dummer, supra,* is quoted with approbation, and it is more distinctly announced in the later case of *Gooden* v. *The Canal Co.,* 18 Ohio St. 182, where it is said to be "well settled that the property of a corporation is a trust fund in the hands of its directors, for the benefit of its creditors and stockholders."

It being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows, that after the insolvency of the corporation is ascertained, and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property, become trustees thereof for the creditors; and this relation, necessarily forbids any discrimination between the beneficiaries, in the distribution or application of the fund. The due execution of the trust, demands absolute impartiality toward the *cestui que trustent.* They must be treated alike, and no preference can be made among them, without a direct violation of the duties arising from the relation. It would seem clear, that, if the corporate prop-

erty constitutes a fund for the creditors, it is as much so for one creditor as for another, and that the directors in possession, are without authority to dispose of it in disregard of the rights of any creditor. They can no more discriminate between creditors in such case, than they could, before the insolvency of the corporation, between the shareholders. The objects for which the corporation was created being no longer prosecuted, and the occasion, for the exercise by the board of directors, of the power of control and disposition of the property for such purpose having ceased, there remains no purpose to which its assets can lawfully be devoted, except to the payment of the debts. In equity the corporate property becomes the property of the creditors, and their equities are equal. Every creditor, who became such by parting with his money, property or other thing of value to the corporation, contributed to the accomplishment of its purposes, and augmented its corporate fund; and when the fund is no longer demanded for the purposes of the corporation, the rights of the creditors become fixed instantly and equally; for each, having contributed to the common fund, has an interest in it, in proportion to his claim, equally with every other creditor. This interest is sometimes called the equitable lien of the creditor on the corporate property, which enables him to follow it, even after it has left the hands of the directors, wherever it can be found, except in the possession of *bona fide* purchasers for value, and subject it to the payment of the corporate indebtedness. It would seem to result as a necessary consequence, that insolvent corporations which have ceased to carry on business, cannot, by pledge or mortgage of the corporate property to some of the creditors, in payment or security of antecedent debts, without other consideration, create valid preferences in their favor over others; and this is the view maintained by the more recent writers on the subject.

In the last edition of Taylor on Private Corporations, it is said: "When corporations become insolvent, the duty of

the directors toward its creditors becomes even stricter and more imperative; for, under such circumstances, the rights of creditors are paramount, and it has become probable that they will be somewhat damaged; and the plain duty of directors who control the funds from which corporate debts are paid, is to see that the loss is as small as possible. Moreover, since, upon the insolvency of the corporation, the rights of unsecured creditors are equal, it would seem to be unlawful, even in the absence of a statute expressly forbidding it, for directors to make preferences among them." (Sec. 759.) And, in sec. 668, it is further said: "To allow an insolvent corporation to make an assignment of its property, giving preferences to a portion of its creditors over the others, is unjust, as well as utterly repugnant to the doctrine that corporate property is a trust fund, on the credit of which persons contract with the corporation. If such property constitutes such a fund, it is clearly held in trust for the benefit of one creditor just as much as another, and to prefer one creditor to another is evidently beyond the authority of the trustee. This view is far from being unsupported by direct authority."

Mr. Morawitz, in his excellent work on private corporations, referring to the cases which hold that corporate preferences are valid, says:

"This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security, has often been recognized by the courts of equity in adjusting the rights of creditors among themselves, and in relation to the company's shareholders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors, become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain cred-

itors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property, in order to carry on its business and further the purposes for which the company was formed. The purposes of a corporation are not furthered in any manner, by giving it or its agents the power, after the company has become insolvent and has ceased to carry on business, and after its shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress. The doctrine that an insolvent corporation may prefer certain creditors at the expense of others, seems to have been first started in *Catlin* v. *Eagle Bank,* (6 Conn. 233), a case in which the fundamental rule that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and is contrary to the plainest principles of justice." (2 Morawitz, Corporations, sec. 803.)

And in a very recent work on insolvent corporations it is said: "The practical working of the rule sustaining corporate preferences is monstrous. The unpreferred creditors have only a myth or shadow left to which resort can be had for payment of their claims; a soulless, fictitious, unsubstantial entity that can be neither seen nor found. The capital and assets of the corporation, the creditors' trust fund, may, under this rule, be carved out and apportioned among a chosen few, usually the family connections or immediate friends of the officers making the preference. This rule of law is entitled to take precedence among the many reckless absurdities to be met with in cases affecting corporations, as being a manifest travesty upon natural justice." (Wait on Insolv. Corporations, section 162.) "Elsewhere we have

deprecated the right which is recognized in a number of cases, of insolvent corporations to make preferential assignments. It would seem to be an idle waste of words to designate the capital and assets of a corporation as a trust fund for the benefit and security of creditors in the event of dissolution or insolvency, if one of the first principles of the law of trusts—equality of distribution—could be openly violated, and the effects of the bankrupt company apportioned among a favored few." (Ib., section 654.)

Without extending the discussion, we are of opinion that when a corporation for profit, organized under the laws of this state, becomes insolvent and ceases to carry on its business or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors, in proportion to the amounts of their respective claims; and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf, over the other creditors, or over an assignment thereafter made for the benefit of creditors.

Instead of the individual liability of the stockholders being a ground of objection to this conclusion, it furnishes an additional reason in its support. It is well settled that the corporate property is the primary fund for the payment of the debts of the corporation, and the statutory liability of the stockholder is a security to be resorted to only when the payment of its debts cannot be enforced against its property; and it was held in *Harpold* v. *Stobart*, decided at this term, that stockholders who have assigned their stock to an insolvent assignee, are liable only for such portion of the debts existing while they were such stockholders, as is equal to the proportion which their stock bears to the stock held by all stockholders liable for the same debts. Admit the power of the board of directors of an insolvent corporation to make preferences among its creditors, and it must follow

that they may prefer any they choose to select for that purpose. This would be wholly inconsistent with the trust relation subsisting between the directors and shareholders, for since different stockholders, or classes of stockholders may be liable for different debts, and not all for the same debts, if the directors could apply the corporate property to some of its debts leaving others entirely unprovided for, they would be at liberty to select the debts for which particular stockholders alone were liable, and appropriate all of the property to their satisfaction, leaving the other stockholders to respond to the full extent of their statutory liability, for the remaining debts. The directors would in this way, be enabled to apply the whole corporate property to their own exoneration.

Whether an insolvent corporation, which is still a going concern, and in good faith engaged in the prosecution of its business, may borrow money, or contract, or procure an extension of other *bona fide* indebtedness, and convey or pledge the corporate property in security thereof, is a question not involved in this case, and upon which we here express no opinion.

It appears from the finding of facts in this case, that the directors of the corporation declared its insolvency, and directed by the same resolution, the execution of an assignment for the benefit of its creditors, and of the preferential mortgages to the bank, and other creditors. It does not appear, that there had been any agreement between the mortgagees and the corporation that such mortgages should be given, nor, that they were given for any other consideration than the antecedent indebtedness of the corporation to the creditors receiving them. Being merely voluntary mortgages to secure pre-existing debts, without other consideration, they cannot prevail against the equitable rights of the corporate creditors. *Lewis* v. *Anderson*, 20 Ohio St. 281.

Counsel have argued at length, and with great ability, another question sufficiently raised on the record, and that is,

whether, in view of the facts found by the court below that the execution of the assignment for the benefit of creditors, and the preferential mortgages, was directed by the same resolution, and were in fact executed at the same time, the several instruments may not be treated as constituting together an assignment in trust, with intent to prefer the mortgagees, and so inure to the equal benefit of all creditors. The determination of this question not being necessary to the decision of the case, no opinion is expressed upon it.

Other questions presented in the argument, and considered by the court, do not call for further report.

No serious objection is made here to so much of the judgment of the court below as establishes the amount of the plaintiff's claim, and requires the assignee to allow the same in the administration of his trust, and to that extent the judgment is affirmed. But the judgment establishing the validity of the mortgage, and giving it priority over the assignment, is reversed, and judgment will be entered upon that branch of the case for the trustee.

Judgment accordingly.[2]

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[2] *Compare: Fowler* v. *Bell,* 90 Tex. 150, 1896. (The law of Iowa permits a corporation to prefer creditors; the law of Texas prohibits such preferences. The A Company, an Iowa corporation, did business and owned property in Texas. It executed in Iowa a mortgage to C, a creditor, on its land in Texas, the mortgage amounting to a preference. *Held,* that the mortgage was void.)

For cases accord and contra involving preferences to the creditors of a corporation generally; See Amer. Dig. tit. Corporations, Key, No. 544; 12 Cent. Dig. tit. Corporations, §§ 2162-2169; Also, 10 Cyc. 1246, *et seq.*

OLNEY *v.* THE CONANICUT LAND CO.

IN THE SUPREME COURT OF RHODE ISLAND, 1889.

16 Rhode Island Reports, 597.

BILL IN EQUITY to annul a mortgage and for a receiver.

STINESS, *J.* The complainants, judgment creditors of the Conanicut Land Company, seek to set aside a mortgage given to the defendants Lippitt, Davis, and Bradford, to secure them for advances, and for their indorsements of the notes of the company. The mortgage was given immediately after the complainants had brought suits for damage against the company for negligence, and *when the company was insolvent;* the agreed statement of facts showing that it had not sufficient assets with which to discharge all its outstanding indebtedness, were payment of the same to be demanded when due. Since then the complainants have levied execution on the property of the company. The complainants claim that, as the mortgagees are three of the four directors who voted to give the mortgage, thereby securing themselves, their action is so inconsistent with their fiduciary relation that it should be set aside. No fraudulent act in regard to the giving of the mortgage is alleged, other than the fact itself and the case being submitted on bill, answer, and agreed facts as to the validity of the mortgage, we have the simple question whether their directors of an insolvent corporation are debarred in equity, by virtue of their positions, from preferring debts due to themselves. In so far as the mortgage is to be regarded as a mere preference, it is not contended that it is invalid. Except as limited by statute, the right of a debtor to prefer a part of his creditors has always been upheld in this State. *Dockray* v. *Dockray*, 2 R. I. 547; *Elliott* v. *Benedict*, 13 R. I. 463. The vital question is, whether a director of an insolvent corporation is to be re-

garded as a trustee for its creditor. If he is so, the duty of a trustee to a *cestui que trust* is plain. For a trustee to collect his own debts, to the detriment of that of his *cestui,* is a clear breach of fidelity. When one accepts the trust of caring for another's interest he accepts the attendant duty. It must be admitted that directors of a corporation are not technical trustees. They do not have in themselves the title to property which they hold for the benefit of others; and certainly, as to creditors, they are under no express trust. The corporation is a legal being, distinct from its stockholders and officers. It may deal with them as individuals and may owe them debts. It holds its own property, and has the capacity and responsibility of acting for itself. Nevertheless the conduct of its affairs must, of necessity, be intrusted to officers in whom confidence is reposed, to whom large powers are given, and by whom its property is managed for the common benefit. As corporations have multiplied and have become so greatly concerned in business affairs in recent years, the obligations arising from such a relation have become correspondingly prominent. While the decisions in regard to this relation are not harmonious, it has been generally agreed that directors are trustees for stockholders. This being established, we think it follows naturally that, when the corporation becomes insolvent and the stockholders have no longer a substantial interest in the property of the corporation, directors should be regarded as trustees of the creditors to whom the property of the corporation must go. If directors, with their office, assume the duty of caring for the interests of the stockholders, why do they not also assume the duty incidentally of caring for the interests of those who, instead of the stockholders, may come to have claims upon the corporate property

In speaking of directors as trustees for stockholders, Mr. Justice Miller, in *Sawyer* v. *Hoag,* 17 Wall. 610, calls this "a doctrine of modern date;" but as long ago as the time

of Lord Hardwicke we find the duties and obligations of a director of a corporation thus clearly set forth: "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. But it cannot be said to be an employment affecting the public government. Therefore committee men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees." *Charitable Corporation* v. *Sutton,* 2 Atk. 400. To the effect that officers of a corporation are trustees for the stockholders, see *Hodges* v. *New England Screw Co.* 1 R. I. 312; *Hoyle* v. *Plattsburgh & Montreal R. R. Co.* 54 N. Y. 314; *Koehler v. Black River Co.* 2 Black, 715; *York & North Midland Railway Co.* v. *Hudson,* 16 Beav. 485; 19 Eng. Law & Eq. 361; *Great Luxembourg Railway* v. *Magnay,* 25 Beav. 586; *Hope et ux.* v. *Valley City Salt Co.* 25 W. Va. 789. Indeed, no cases, that we know of, deny a fiduciary relation of directors to stockholders, however they may differ in the use of terms to describe it. This relation has led logically to the conclusion that in case of insolvency, the assets of the corporation being no longer held for the benefit of stockholders, but for the benefit of creditors, the directors owe to the creditors the duty of a trustee. This duty is clearly stated by Clifford, *J.*, in *Bradley* v. *Converse,* 4 Cliff. 375: "Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation, and courts of equity will enforce the execution of such trusts in favor of creditors, even when the matter in controversy may not be cognizable in a court of law. Such assets are usually controlled and managed by directors or trustees, but

courts of equity will not permit such managers, in dealing with the trust estate, in the exercise of the powers of their trust, to obtain any undue advantage for themselves, to the injury or prejudice of those for whom they are acting in a fiduciary relation. Exact equality of benefit may be enjoyed, but the trustees are forbidden to protect, indemnify, or pay themselves at the expense of those who are similarly in relation to the same fund."

To the same effect are *Bradley* v. *Farwell,* 1 Holmes, 433; *Jackson* v. *Ludeling,* 21 Wall. 616; *Corbett* v. *Woodward,* 5 Sawyer, 403; *Stout* v. *Yaegers Milling Co.* 3 Fed. Rep. 802; *Haywood* v. *Lincoln Lumber Co.* 64 Wisc. 639; *Richard* v. *New Hampshire Insur. Co.* 43 N. H. 263; *San Francisco & North Pacif. R. R. Co.* v. *Lee,* 48 Cal. 398; *Gaslight Improvement Co.* v. *Terrell,* L. R. 10 Eq. 168; *Hopkins's & Johnson's Appeal,* 90 Pa. St. 69. Of the cases cited by the defendants, only three fully sustain their claim that, as creditors of the company, directors may, in the absence of fraud, secure themselves for their own debt, viz.: *Burr's Executors* v. *McDonald,* 3 Gratt, 206; *Planters' Bank of Farmville* v. *Whittle,* 78 Va. 737; *Garrett* v. *The Burlington Plow Co.* 70 Iowa, 697.

In the case of *Railroad Co.* v. *Claghorn,* 1 Speer Eq. 545, 562, frequently cited upon this point, the mortgage in question was not given to, nor was the suit brought against, directors; neither did the court find that the company was insolvent when the mortgage was given. The case depended mainly on a statute. In *Stratton* v. *Allen,* 16 N. J. Eq. 229, 232, the court expressed no opinion upon the point taken that the defendant was a trustee by virtue of his office as director, but did hold that he was not entitled to priority, but must share proportionately with other creditors. This case also depended upon a statute.

In *Buell* v. *Buckingham,* 16 Iowa. 284, Judge Cole stated there was no evidence that the company was in-

solvent. Judge Dillon conceded that directors are trustees for stockholders, and treats the case as a sale voidable between trustee and *cestui que trust,* to which a subsequent attaching creditor, having no lien upon the property at the time, could not make objection.[1] *Garret* v. *The Burlington Plow Co.* depended upon this and other cases in Iowa which had followed its apparent doctrine. In *Burr's Executors* v. *McDonald,* the question was not discussed upon prinpiple or authority. In *Planters' Bank of Farmville* v. *Whittle,* the question was elaborately discussed. The cases upon which the court relied were *Railroad Co.* v. *Claghorn; Stratton* v. *Allen*; and *Buell* v. *Buckingham,* to which we have referred; also *Ashhurst's Appeal,* 60 Pa. St. 290, which was a suit by stockholders, denied on account of *laches* and absence of fraud, the court saying: "Creditors could have avoided what was done, but the complainants are not claiming as creditors or through creditors." *Smith* v. *Skeary,* 47 Conn. 47, in which the company was supposed to be solvent at the time of the transaction complained of; also *Gordon* v. *Preston,* 1 Watts, 385; *Whitwell* v. *Warren,* 20 Vt. 425; and *Sargent* v. *Webster,* 13 Met. 497, in neither of which cases was this subject treated of at length, or as an important element of the case.

We think the weight of recent authority regards directors of an insolvent corporation as trustees for creditors, and that this authority stands upon the better reason. If, as Judge Dillon said, the right to collect a debt is "a race of diligence," open alike to both, it must be admitted that it is a race in which the outside creditor is unduly handicapped. The parties do not contend upon an equal footing; and although it is said that the director has only an advantage which results from his position, and which is known to all who

[1] Note by the Reporter.—[See, on this point, *In re Wincham Shipbuilding, &c., Co.* Jessel's Decision, 240; L R. 9 Ch. Div. 322, 328.
On the doctrine of the decision see *Curran* v. *Arkansas,* 15 How. U. S. 304, 311, and 1 Hare Amer. Constit. Law, 635-637, text and note.]

deal with the corporation, yet no one would say that an ordinary trustee should be entitled to an unequal start with his *cestui,* by means of information received in the discharge of his trust. If, then, the director be a trustee, or one who holds a fiduciary relation to the creditors, in case of insolvency he cannot take advantage of his position for his own benefit to their loss. The right of the creditor does not depend upon fraud or no fraud, but upon the fiduciary relation. * * *[2]

Our conclusion is that, in view of the fiduciary relation of the directors to the creditors of the company, they are not entitled to priority over the complainants by virtue of their mortgage.[3]

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[2] The Court's discussion of certain facts claimed to exist by the defendants, but which the Court thought were not supported by the evidence, is omitted.

[3] For reference to cases see note to *Adams & Westlake Co.* v. *Dyette, infra,* p. 828.

SANFORD FORK AND TOOL CO. *v.* HOWE.

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF INDIANA, AND IN THE SUPREME COURT OF THE UNITED STATES, 1890.

44 *Federal Reporter, and* 157 *United States Reports,* 312.

The Sanford Fork and Tool Co. was organized in 1888. Requiring money to enable it to develop its business it gave notes aggregating $69,000, endorsed by six of its directors and stockholders to various persons. The money from the notes went into property of the company.

At the time these directors and stockholders indorsed these notes the Tool Company was a going concern, in full operation, with property and means "amply sufficient to pay all of its indebtedness if its property was worth what it had cost in cash." They believe that such property was worth what it had cost in cash, that the corporation was "solvent and capable of becoming an independent and profitable manufacturing institution as soon as it could win its way to a favorable market for its manufactured products." As these notes thus indorsed began to mature the directors found that the company was unable to pay them, and required a renewal or an extension. Thereupon, on March 1, 1890, they called a special meeting of the stockholders, which was held on March 15. At this meeting, out of a total of three thousand shares, two thousand two hundred and fifty were represented, and a resolution was passed authorizing the directors to execute a mortgage or mortgages upon all or any part of the property of the corporation, to secure any new indebtedness that might be incurred, or the renewal and extension of any present indebtedness or liability of the corporation. On March 17 the mortgage was executed, though it was not recorded until May 1, 1890. The directors and stockholders who were endorsees then paid or

procured renewals of the several notes, and in addition two of them endorsed and subsequently paid other paper of the company to the amount of $6,000. On May 13, 1890, the company failed and its property passed to John W. Davis, as receiver. At the date of the execution of this mortgage the Tool Company was indebted in the sum of two hundred and seventy-five thousand dollars. The value of its property at that time does not appear, but after the appointment of a receiver it was appraised, the manufacturing plant—the property described in the trust deed and mortgage—being appraised at $116,055.39; the other and unencumbered property at $88,390.85.

This was a suit by the creditors of the company to set aside the mortgage. The defendants demurred.[1]

Woods, District Judge.[2] The complainants are shown to be general creditors of the company, with claims which, as allowed by the Vigo circuit court, amount to $11,631.39; and they dispute the validity of the mortgage for the indemnity of the respondents on the ground that the directors of the company had no right to obtain a preference for themselves over other creditors. It is not alleged, nor was it claimed in argument, that the respondents, or any of them, did anything with an actual intent to defraud. The question whether or not an insolvent corporation which had not suspended business could prefer its directors or managing agents, who were its creditors, or liable as indorsers of its paper, was considered upon full argument and citation of authorities *pro* and *con* in the case of *Lipincott* v. *Carriage Co.*, 25 Fed. Rep. 577, 586, and the conclusion was reached that the weight of authority and reason was against the validity of such preferences. The theory upon which that conclusion was based is shown in the following extract from the opinion:

"For while it is generally conceded that a corporation,

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[1] The facts are restated.

[2] His reference to the facts is omitted.

notwithstanding insolvency, continues possessed [while a going concern] of a general power of management of its affairs, and, like natural persons, may give preferences by way of payment or security to one creditor or class of creditors over others, yet in close analogy to the rule which forbids the giving of preferences by individual debtors, for the purpose of securing, or in such manner as to secure, advantage or benefit to themselves, and in manifest accord with the tendency of judicial opinion, as expressed upon consideration of kindred questions, it has been decided in a number of cases that perferences given by insolvent corporations, in such manner as to be of special benefit to the directors or managing agents, or any of them, will be set aside. Indeed, it has been often said by judges, includng those of the federal supreme court, that the property of an insolvent corporation is a trust fund, and the directors trustees for the creditors; and, if this were strictly so, it is manifest that no preferences could be allowed between creditors standing in the same relation to the fund. These statements are, however, true in a qualified sense, and lead logically, if not necessarily, to the conclusion that in such cases, if they give preferences, they must do it unbiased by considerations of personal advantage or gain."

That ruling has the support of a number of later decisions, in some of which it is expressly approved: *White, etc., Manuf'g Co.* v. *Pettes Importing Co.*, 30 Fed. Rep. 864; *Adams* v. *Milling Co.*, 35 Fed. Rep. 433; *Beach* v. *Miller*, (Ill.) 22 N. E. Rep. 464; *Haywood* v. *Lumber Co.*, 64 Wis. 639, 26 N. W. Rep. 184; *Olney* v. *Land Co.*, 16 R. I. 361, 18 Atl. Rep. 181; *Rouse* v. *Bank*, (Ohio,) 22 N. E. Rep. 293. See, also, *Hope* v. *Salt Co.*, 25 W. Va. 789; *Gillet* v. *Moody*, 3 N. Y. 479. On the contrary, the supreme court of Iowa, in the recent case of *Garrett* v. *Plow Co.*, 70 Iowa, 697, 29 N. W. Rep. 395, has declared such preferences valid if fairly given, and in support of that view counsel for the respondents have referred to the following

cases, not cited in *Lippincott* v. *Carriage Co., supra: Stratton* v. *Allen,* 16 N. J. Eq. 229; *Wilkinson* v. *Bauerle,* 41 N. J. Eq. 635, 7 Atl. Rep. 514; *Railroad Co.* v. *Dewey,* 14 Mich. 477.

It is not to be overlooked that some of the later decisions which deny the validity of preferences in favor of directors proceed upon the theory that the directors of an insolvent corporation, even before a suspension of business, are trustees for the creditors, and, if that theory is essential to the conclusion, the question is perhaps already foreclosed in the federal courts; because, in *Purifier Co.* v. *McGroarty,* 136 U. S. 241, 10 Sup. Ct. Rep. 1017, the supreme court has said that the decision in *Rouse* v. *Bank, supra,* "proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence." But I do not think that theory indispensable. It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be, exclusive, knowledge of the corporate affairs into means of self-protection to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests I think will compel its recognition and adoption. The fact in this case that the stockholders authorized the making of the mortgage seems to be immaterial. That action was, it is averred, procured by the directors proposed to be benefited, they, themselves, being stockholders; and, even if this were not averred, the case would not, I think,

be essentially different. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth; and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization, for the purpose, not only of escaping the ordinary risks of business done in the owner's name, which may be legitimate enough, but of enabling the promoters and managers, when failure comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which Equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence.

The demurrer is overruled.

The defendant appealed.

Mr. Justice BREWER: In the absence of any testimony, and in the manner in which this case was submitted for decision, it must be assumed that the matters alleged in the bill and not denied in the answer and the new matters set forth in the answer are true. And the question which arises is whether, upon these admitted facts, the decree in favor of the plaintiffs can be sustained.

The manufacturing business in which the corporation was engaged was a new enterprise. It had been carried on for only about eighteen months. In that business had been invested nearly $300,000, and the property possessed by the corporation was at its cost price equal to the entire indebtedness. It thus appears that there had been no waste, mis-

management, or loss. Not a dollar of the indebtedness was held by any director or stockholder, but the personal credit of the six directors and stockholders had been loaned to the company to the extent of $69,000. The corporation was still a going concern. There was no purpose of abandoning the business. The indorsers believed that if the corporation could be tided over its temporary embarrassment it could be made successful. The stockholders authorized the mortgage. It was given only upon part of the property, and that part already encumbered by a fifty thousand dollar trust deed. The value of this property was, according to the subsequent appraisement, much below the sums secured by the trust deed and the mortgage. In addition the corporation had nearly $90,000 of unencumbered property to apply in satisfaction of the claims of its creditors. The mortgage was not given simply as security for a past indebtedness, but to induce the indorsers to obtain for the corporation a renewal or extention of its obligations, and to make further indorsements. In reliance upon this mortgage the indorsers secured renewals or extensons, or themselves took up the notes they had indorsed, and at the same time lent the credit of their names to new paper of the company. Thus they prevented a suspension of the business and enabled the corporation to continue its operations, and did so believing that by such continuance the corporation would be enabled to work itself out of its temporary difficulties. All this was done in the utmost good faith.

Under these circumstances, should the transaction be condemned and the mortgage held void as against creditors? This question, we think, must be answered in the negative. It is said that the directors of a corporation stand in a fiduciary relation to both the stockholders and the creditors. Whatever may be the extent of the fiduciary obligations of directors to stockholders, there can be no pretence in this case of a breach thereof. The mortgage was expressly authorized by the stockholders, and they cannot claim that

the directors in executing the instrument, which they had themselves authorized, were guilty of any breach of duty to them. It is often said that the directors may not take advantage of their position and power to secure personal advantage to themselves, but that proposition has no application here, for the corporation itself directed this mortgage. It was an application by the debtor of its property to secure certain of its creditors, and not the act of the agents of a debtor to protect themselves. The case involves no breach of trust on the part of the agent towards the principal, but more closely resembles the case of an individual debtor giving preferences to certain of his friends, and the general rule is that, in the absence of statute, a debtor has such *jus disponendi* in respect to his property that, although insolvent and contemplating a cessation of business and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment.

But, passing from the relations of directors to the corporation and its stockholders, it is one of the vexed questions of the law as to how far the duty of a corporation and its directors to creditors interferes with the otherwise conceded power of a debtor to prefer certain of his creditors. Into a discussion of this question in its length and breadth we deem it unnecessary now to enter, for the facts of this case remove many of the embarrassments that often attend such questions. This is not like the case of *Sutton Manufacturing Co.* v. *Hutchinson*, 63 Fed. Rep. 496, decided by the United States Court of Appeals for the Seventh Circuit, in which the directors of a corporation, insolvent and intending to discontinue business, gave a mortgage to secure certain of their number who happened to be creditors, and thus attempted to secure a preference in behalf of themselves. Nor is it the case of the directors of a corporation in fact insolvent, though continuing and expecting to continue in business, executing a mortgage on the property of

the corporation to simply secure themselves for a past indebtedness; for here the corporation, although insolvent within the rule which declares that insolvency exists when a debtor has not property sufficient to pay his debts, was still a going concern and intending to continue its business, and the mortgage was executed not simply to secure directors and stockholders for past indebtedness but to induce them to procure a renewal or extension of paper of the company then maturing or about to mature, and also to obtain further advances of credit.

Will it be doubted that, if this mortgage had been given directly to the holders of these notes, it would have been valid? Are creditors who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation, because, forsooth, they have also the guarantee of some of the directors or stockholders, whose guarantee may or may not be worth anything?

But even that is not this case, for here the corporation was a going concern and intending to continue in business, and the mortgage was given with a view of enabling it to so continue, and to prevent creditors whose debts were maturing from invoking the aid of the courts to put a stop thereto. Can it be that, if at any given time in the history of a corporation engaged in business, the market value of its property is in fact less than the amount of its indebtedness, the directors, no matter what they believe as to such value, or what their expectations as to the success of the business, act at their own peril in taking to themselves indemnity for the further use of their credit in behalf of the corporation? Is it a duty resting upon them to immediately stop business and close up the affairs of the corporation? Surely, a doctrine like that would stand in the way of the development

of almost any new enterprise. It is a familiar fact that in the early days of any manufacturing establishment, and before its business has become fully developed, the value of the plant is less than the amount of money which it has cost, and if the directors cannot indemnify themselves for the continued use of their personal credit for the benefit of the corporation, many such enterprises must stop in their very beginning.

It is worthy of note, too, that these directors placed the encumbrance not on the entire property of the corporation, but only upon that part which ordinarily shows the greatest difference between value and cost, to wit, the building and the machinery—property, too, which was already encumbered for a large sum, leaving free all the unencumbered property of the corporation to answer to the claims of creditors.

Of course, an underlying fact, expressly stated to have existed in these transactions, is good faith. Carrying on business after the giving of an indemnifying mortgage, with a knowledge of insolvency, with the expectation of soon winding up the affairs of the corporation, and only for the sake of giving an appearance of good faith, leaves the transaction precisely as though the mortgage was executed at the moment of distribution, and with the view of a personal preference.

Again, not only was the corporation a going concern, not only did the directors expect and intend that it should continue, and believe that its continuance would bring financial success, but, as appears, they did continue the business for two months, and during that time paid out in the ordinary management of its affairs and in discharge of its debts over $30,000, without appropriating a single dollar to the payment of the claims for the indorsement of which they had taken this indemnity.

We are of opinion that these facts clearly and fully distinguish this case from many which have been cited, in which

the action of the directors of a corporation in securing to themselves preferences in the hour of its extremities has been adjudged void, and that it is going too far to hold that a corporation may not give a mortgage to its directors who have lent their credit to it, to induce a continuance of the loan of that credit, and obtain renewals of maturing paper at a time when the corporation, though not in fact possessed of assets equal to its indebtedness, is a going concern, and is intending and expecting to continue in business. We are, therefore, of opinion that the Circuit Court erred, and the decree will be

Reversed and the case remanded for further proceedings not inconsistent with this opinion.[3]

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[3] *Compare: Corey* v. *Wadsworth,* 99 Ala 68, 1891. (Stone, C. J., having set forth that the directors of an insolvent corporation cannot prefer themselves as creditors, said: "At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principle we have declared? 'It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so. In other words, if it be, in good faith, what is sometimes called a *going* business or establishment. Many successful corporate enterprises, it its believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent."

West v. *Hanson Produce Co.,* 6 Colo. App. 467, 1895. (B, C and D were directors of the A Company. The A Company desired to raise money on its notes at a certain Bank. The Bank refused to take the notes unless they were endorsed by B, C and D, which was done. The A Company, not being able to pay the notes at maturity, assigned all its property to T in trust to sell the same, and pay the proceeds to the Bank on account of the debt on the notes. P, a creditor of the A Company, began garnishee proceedings against T. Judgment for P reversed on appeal. Reed, P. J.: "After having stipulated 'that the money was borrowed by the company and these parties became security for it,' counsel for appellee, in argument, fall into error by regarding the debt as that of the indorsers or sureties. They say, 'But we fail to find in appellant's brief authorities sustaining preferences made by directors of an insolvent corporation in favor of themselves.' Again, 'Any attempt on the part of the directors of an insolvent corporation to prefer themselves is a fraud upon the creditors.' This mistaken theory of the case is ably argued at length, and authorities are cited supposed to favor the contention, but the question is not involved. The

fact that they were sureties for the payment of the debt and made the note—and although the payment of the note would relieve them of their liability and may have prompted them to prefer the bank, —the debt remained the debt of the corporation and did not become that of the individual officers. The great weight of modern authority is to the effect that, as individuals, the officers of a corporation can loan it money, or legally, in any other proper way, become its creditors and deal with it in the same manner as with an outsider. If such is the law,—and it seems to be where there is no statutory prohibition,— it logically follows that the right to become a creditor carries with it all the rights of a creditor, and authorizes the corporation to prefer the officer if it sees fit."

Milledgeville Banking Co. v. *McIntyre Store,* 98 Ga. 503, 1896. (Lumpkin, J., having announced the principle that the directors of insolvent corporation, while they could prefer certain creditors, could not, being creditors prefer themselves, said: "We think the mortgage in favor of Waxelbaum & Sons stands upon as good a footing as does that executed in favor of the Banking Company. It is true that the directors, or some of them, had given to Waxelbaum & Sons a joint promissory note, binding upon each individually, as collateral security for the payment of the debt incurred by the corporation; but if Waxelbaum & Sons became dissatisfied with the security thus given them, we see no reason why they could not very properly request that their claim be secured by mortgage, or why, upon getting the same, they are not entitled to hold it and reap the benefit to be derived from it. They certainly thereby gained no advantage over the complaining creditors other than the law expressly allows; and having kept strictly within the bounds of their legal rights in securing their preference, even a court exercising equitable jurisdiction has no power to restrain them from enforcing their mortgage, or to declare the same inoperative or void in their hands as against unsecured creditors.")

Mueller v. *Fire Clay Co.,* 183 Pa. 450, 1898. (The A Company gave notes to a Bank, the directors of the Company becoming endorsees. The Company not having the ready money to pay the Bank, the Bank insisted that the Company confess judgment to the directors in trust for the Bank. *Held,* that even if the Company was insolvent at the time of the judgment, the judgment was not fraudulent because of the interest of the directors as endorsees.)

In some jurisdictions preferences to directors and stockholders are allowed. See, *Warfield* v. *Marshall County Canning Co.,* 72 Iowa 666, 1887. (A Company, needing money, borrowed on notes given or enclosed by some of its stockholders. The Company, being unable to pay the notes by a vote of its stockholders gave a mortgage to the stockholders, who were creditors, and then assigned all the property of the Company to a new Company formed by the shareholders of the first Company and other persons, the consideration being the agreement of the second Company to pay the mortgage, which was full value for the property assigned. *Held,* that the creditors of the first Company could not impeach the transaction, though it was with the knowledge of all parties that the other creditors of the first Company would never realize anything on their claims.)

Compare: Sells v. *Rosedale Grocery and Commission Co.,* 72 Miss. 590, 1895. (The stockholders of the A Company and the B stockholders, were in large part, but not entirely identical. The A Company was a creditor of the B Company. The B Company was insolvent. *Held,* that the B Company could prefer the A Company to its other creditors.)

In *Buell* v. *Buckingham,* 16 Iowa 284, 291, Judge Dillon said: "Being an officer of the corporation did not deprive Buell of the right to

enter into competition with other creditors and run a race of vigilance with them, availing himself in the contest of his superior knowledge and of the advantage of his position, to obtain security for, or payment of, his debt."

The position that directors being creditors of the corporation have power to give themselves preferences, but that the burden is on the directors in such cases to show that they had a *bona fide* debt against the corporation is taken in *Schufeldt* v. *Smith*, 131 Mo. 280, 1895. See, to the same effect, the opinion of Judge Taft in *Brown* v. *Grand Rapids Co.*, 58 Fed. 286, 1893, 292. See also the opinion in *Levering* v. *Bimel*, 146 Ind. 545, 1897. In this case, however, the vote of the director for his own preference was not necessary to carry the resolution. Query, whether this fact is of any importance?

It is suggested that the student discuss whether the law should or should not discriminate between preferences to directors and preferences to stockholders.

ADAMS AND WESTLAKE CO. *v.* DEYETTE.

IN THE SUPREME COURT OF SOUTH DAKOTA, 1895.

8 South Dakota Reports, 119.

On the 9th day of May, 1888, the Hicks-Trask Hardware Co., a corporation, being insolvent, confessed judgment against itself in favor of each of the defendants C. E. Deyette and W. W. Lewis, amounting to $1,469.26; the Deyette judgment being for $649.84, and the Lewis judgment for $819.42. After entry of the above judgments, and on the 12th day of the same month, said defendant confessed numerous other judgments, among which there was one in plaintiff's favor for $1,319.47. Executions issued in succession, and the property of the defendant corporation was levied upon in the order above indicated, and in the order in which the respective judgments were entered and docketed; and the property of the corporation was found to be insufficient to satisfy the judgments which preceded that of the plaintiff. The referee made, among others, the following findings of fact: (14) That the consideration of the confession of judgment in favor of Charles E. Deyette was as follows: $514.60, money loaned to the Hicks-Trask Hardware Company on January 20, 1888, was borrowed by said company for the purpose of using the same to purchase the stock of said company held by Trask, and on account of the indebtedness of $134.22, owing to said Deyette by said corporation for work and labor done by said Deyette for said corporation. (15) That the defendant Deyette had actual knowledge of the purpose and intent of the said corporation to use the same in the purchase of stock. (16) That the consideration of the judgment of the defendant Lewis was $514.60, money loaned to the said corporation by him about January 20, 1888, and borrowed by said company for the purpose of using the same in the purchase of

stock of said corporation held by Trask; and the sum of $304.07, due Lewis from said corporation on account of services rendered by Lewis to said corporation. (17) That defendant knew of the purpose and intent for which said money was borrowed by said corporation. (18) That the defendant Lewis, at the time of and prior to the making of said confession of judgment to himself, was a director of said corporation, and secretary thereof, and signed said confessions as secretary on behalf of said corporation. (19) That the defendant Deyette, at the time of said confessions of judgment by said corporation to himself, was not a director. (20) That no written consent of the stockholders of the Hicks-Trask Hardware Company was ever had to the purchase of stock from Trask by said corporation. (21) That on May 12, 1888, executions were issued from the District Court upon the said judgment of said plaintiff to the sheriff of Brown county, in which said defendants the Hicks-Trask Hardware Company had its place of business. (22) That executions issued from the clerk of the District Court of Brown County on each of the judgments of the defendants Foster, Deyette and Lewis, and were by him levied on the personal property of the Hicks-Trask Hardware Company, and all thereof; and the said sheriff sold the same, and holds the money realized from said sale, to be applied on said executions according to the decree of this court. (23) That the proceeds arising from said sale are not sufficient to pay the judgments against the Hicks-Trask Hardware Company prior to the judgment of plaintiff. Upon these findings of fact the following conclusions of law were based: (2) That the judgment of the defendant Deyette, as to the sum of $514.60, money loaned to the said corporation for the purpose of purchasing stock, is invalid, for the reason the Hicks-Trask Hardware Company, and the officers thereof had no power to borrow money for the purchase of its stock; and the defendant having loaned said money knowing of the illegal purpose for which it was to be

used, cannot recover the same from said corporation. (3) That as to the sum of $134.25, included in the judgment of said Deyette, the same is valid, and should stand, and be enforced for said sum of $134.25. (4) That judgment of the defendant Lewis is invalid for the reason that the confession of the same, made by him and obtained by him when he was a director of said corporation, was an illegal preference as against the creditors of said corporation, and that the relief prayed by plaintiff should be granted as against said Lewis. (5) I further find as to the judgment of the defendant Lewis that as to the sum of $514.60 it is invalid for the reason that, as to said amount, the consideration was for money loaned to said corporation by Lewis for the illegal purpose of purchasing stock of said corporation. Judgment by the court was accordingly entered on motion of plaintiff's counsel and defendants Deyette and Lewis appeal therefrom.

The Court, per FULLER, *J.*, affirmed their previous decision confirming the judgment of the trial Court.[1]

KELLAM, *J.*, dissenting.[2] In our former opinion, now adhered to by a majority of the court, we went further, and said that the judgment ought not to be enforced, because it was an effort on the part of an insolvent corporation to prefer Deyette as a creditor, and that an insolvent corporation could not do this. The same cause and the same reason would condemn the entire judgment, as well for services as for money loaned; but upon further reflection and a more thorough examination of the question I am unable to concur in the opinion that a corporation, by becoming insolvent merely, *ipso facto* loses its right to pay or secure one creditor in preference to another. We have declared the right

[1] The opinion confirms at length the reasons for the conclusions set forth by the trial Judge, *supra*. The greater part of the opinion discusses the right of a corporation to purchase its own stock, a question which the editors have made the subject of a separate chapter. See *infra*.

[2] Only so much of the opinion is reprinted as relates to the question of the right of a corporation to prefer some of its creditors, and the question of the right of a corporation to give its director, being a creditor, a preference.

of an individual debtor to make such preferences. *Manufacturing Co.* v. *Max* (S. D.), 58 N. W. 14. We said the right of a debtor to prefer one creditor over another was guaranteed to him by the express words of the statute. Sec. 4654. A corporation or a partnership becomes a debtor under the same circumstances as an individual. If the so-called "trust-fund doctrine" will prevent a corporation debtor from so preferring one creditor to another, I am unable to see why it should not have the same effect, and for the same reason, in case of a partnership. A corporation becomes insolvent just when the partnership or the individual becomes so—when it is unable to pay its debts from its own means as they become due. Comp. Laws, section 4661. Is it well, then, unless required by prevailing authority, to adopt the rule that a private corporation, unable to meet its debts as they mature, has no right to pay one creditor more than it pays all others? It is often said in the books that the assets of an insolvent corporation are a trust fund for the payment of its debts, but this is also true of a partnership, and really of an individual; and for the same reason. Pomeroy says this doctrine of trust is just as applicable to a partnership and its assets as to a corporation and its assets, and that in either case the relation can only be so named by way of "analogy or metaphor." He further says: "It is plain that no constructive trust can arise in favor of the creditors unless the partners or directors, through fraud or breach of fiduciary duty, wrongfully appropriate the property and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means." 2 Pom. Eq. Jur. section 1046. If the rule of disability applies to an insolvent corporation on the ground of its trust relations to its assets, it would seem that it should also apply to an insolvent partnership; but in *Manufacturing Co.* v. *Max, supra,* we sustained the right of Max & Baisch, an insolvent partnership, to make such preferences. I cannot see why, in the case either of a corporation

or a partnership, the mere fact of insolvency, without more, should of itself change the character of what was the absolute property of the corporation or partnership into trust funds. Insolvency creates a condition which justifies a court with equity powers in laying hold of assets, and then so treating and disposing of them. While the assets remain undisturbed in the hands of the corporation or partnership, solvent or insolvent, it owns and may dispose of them as an individual owner may, in any manner not fraudulent as to its creditors, including stockholders in case of a corporation. Nearly all commercial credit is given to the individual, the partnership, or the corporation on the strength of its known assets, and in reliance upon a prudent management and an honest appropriation of them to the payment of its debts. In this sense the property of every debtor is a trust fund, with himself as trustee, for the payment of his debts. It is no more so simply because the debtor is a corporation, so long as it continues its active functions as such, and retains absolute control of its property. At no time does the trust attach to the property because it belongs to a corporation; but when the corporation becomes insolvent and unable to continue its active life it it so far civilly dead that its assets become subject to the administration of the courts. From that time on the assets coming into the hands of the court are treated as a trust fund for the benefit of creditors and stockholders, for they then constitute an estate to be administered. In *Graham* v. *Railroad Co.*, 102 U. S. 148, the learned Judge BRADLEY said: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust for the benefit of its creditors and stockholders. A court of equity, at the instance of proper parties, will then make these funds trust funds, which are, in other circumstances as much the absolute property of the corporation as any man's property is his."

This trust doctrine, as applied to the assets of corporations, solvent and insolvent, was fully discussed by Judge

BREWER in *Hollins* v. *Iron Co.*, 154 U. S. 371, 14 Sup. Ct. 127, and the construction of the court is thus stated in the head note: "The expression often used, that the property of a corporation constitutes a 'trust fund' for its creditors, only means that when the corporation is insolvent, and a court of equity has possession of its assets for administration, such assets must be appropriated to the payment of its debts before any distribution to the stockholders, but, as between a corporation itself and its creditors, the former does not hold its property in trust, or subject to lien in favor of the creditors, in any other sense than does an individual debtor." In *Van Alstyne* v. *Cook*, 25 N. Y. 489, the court, in speaking of the assets of an insolvent, limited partnership, said: "They are trust funds when the courts of equity are properly appealed to in behalf of the partners, or any partner or creditor, to protect and distribute the same upon equitable principles, and on such application assert the control over them. They are not trust funds in the hands of the partners any more than ordinary partnership property." The supreme court of Illinois declares the same doctrine in *Roseboom* v. *Whittaker*, 132 Ill. 81, 23 N. E. 339: "The mere insolvency of a corporation cannot have the effect of depriving creditors of their legal remedies, but they are at liberty, notwithstanding the insolvency, to sue the corporation in an action at law, and by means of such proceeding establish a specific lien upon the property seized by attachment or execution. Such lien, when perfected, will doubtless entitle the creditor acquiring it to a preference over other unsecured creditors. After the aid of a court of equity has been invoked, and that court has taken the assets of the insolvent into its hands, its jurisdiction becomes necessarily exclusive; and it will proceed, in administering the insolvent estate, upon the maxim that equality is equity." See also, the later case of *Peterson* v. *Tailoring Co.*, 150 Ill. 290, 37 N. E. 242. In *Town* v. *Bank*, 2 Doug. (Mich.) 530, it was held that a corporation has the same right to prefer one creditor over another that an individual

has. This was followed in *Kendall* v. *Bishop,* 76 Mich. 634, 43 N. W. 645, and again in the recent case of *Bank of Montreal* v. *E. J. Potts S. & L. Co.,* 90 Mich., 345, 51 N. W. 512, where it was held that "a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence its assets do not become a trust fund for *pro rata* distribution among all of its creditors, until steps are taken under the 'winding-up act.'" This "trust-fund" doctrine is luminously discussed by Judge Mitchell in *Hospes* v. *Car Co.,* 48 Minn. 174, 50 N. W. 1117, who demonstrates that, unless prohibited by statute, an insolvent corporation has the same right as an individual to prefer creditors, and that there is no solid foundation for the doctrine that the insolvency of a corporation has the effect of converting its assets into a "trust fund," in any proper sense of that term. In Ang. & A. Corp. 802, it is laid down as an unqualified proposition of law that "the mere insolvency of a corporation neither impairs its powers to manage its affairs nor converts its property into a trust fund for the benefit of its creditors." Almost precisely the same thing was said in *Catlin* v. *Bank,* 6 Conn. 233, and reiterated by the same court in *Pondville Co.* v. *Clark,* 25 Conn. 97. In the former case the court discussed the question at great length. In the course of its opinion, it says: "The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analogous, but identical, and I discover no reason for the slightest difference between them. * * * The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors."

The same doctrine as to when the assets of an insolvent corporation become trust funds was declared by the Supreme Court of Missouri in *La Grange Butter Tub Co.* v. *National Bank of Commerce,* 26 S. W. 710. The Court said: "In case of an insolvent corporation, a court of equity will make

distribution of the corporation assets *pro rata* among the corporation creditors, and to that end will regard the corporation property as a trust fund. It is in this sense, and upon this principle, that the assets are trust funds. They are trust funds when a court of equity is appealed to in behalf of any member of the corporation or creditor to protect and distribute the assets upon equitable principles." And again in *Alberger* v. *Bank*, 123 Mo. 313, 27 S. W. 657, Judge BARCLAY, in speaking of the notion that insolvency transforms the assets of a corporation into a trust fund said: "This theory seems to have a singular fascination to some learned jurists, but, in our opinion, it is wholly untenable as applied to the facts of such a case as that before us, under the law of Missouri;" and, after a very thorough and instructive discussion of the question he concludes that "the creditor of a corporation has the same right to secure, by superior diligence or persistency, and to retain, a preference for his claim against a private corporation, that he would have were his debtor an individual engaged in the same line of business, provided, always, that the transaction is honest—that is to say, not a mere cover to a purpose to hinder, delay or defraud other creditors of the failing debtor." Such is also the declared law in New Jersey. In *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 640, 7 Atl. 514, the court said: "If there be no legislative prohibition against the transfer of corporate property or its use in preferring creditors after insolvency, no reasons can be given why such transaction should be invalidated, which would not also invalidate the like transactions of individuals. Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors, although it is insolvent, unless such conduct is prohibited by law." The supreme court of Arkansas in the recent case of *Worthen* v. *Griffith*, 59 Ark. 562, 28 S. W. 286, holds the same way, and that "it is only when a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of an

insolvent corporation, that its assets may, in this state, be properly said to be a trust fund for its creditors." The same question as to the right of an insolvent corporation to make preferences was before the court in *Gould* v. *Railway Co.*, 52 Fed. 680. Judge CALDWELL said that it was settled law in Arkansas—from which state the case came—that it might lawfully do so, and added this significant statement: "The established rule in that state is in harmony with the general, though not quite uniform, current of authorities in this country on the question." After referring to a large number of supporting authorities he adds: "The cases which hold the contrary doctrine are bottomed on the erroneous theory that the insolvency of a corporation in effect dissolves it, and makes the directors mere trustees to distribute its assets ratably among its creditors. It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts; but this rule means no more than that the property of a corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of a corporation is applied to the payment of its *bona fide* debts. The rule, as has been often pointed out, does not prevent a corporation, whether solvent or insolvent, from making preferences among its creditors, and exercising in good faith absolute dominion over its property in the conduct of its legitimate corporate business, so long as its right to do so is not restrained by statute or by judicial proceedings." In his opinion Judge CALDWELL refers to the following authorities, none of which I have cited, as sustaining his conclusion: 2 *Mor. Priv. Corp.* 802; *Allis* v. *Jones*, 45 Fed. 148; *Covert* v. *Rogers*, 38 Mich. 363; *Coats* v. *Donnell*, 94 N. Y. 168; *Dana* v. *Bank*, 5 Watts & S. 223; *Warner* v. *Mower*, 11 Vt. 390; *Whitwell* v. *Warner*, 20 Vt. 426; *Stratton* v. *Allen*, 16 N. J. Eq. 229; *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Duncomb* v.

Railroad Co., 84 N. Y. 190, 88 N. Y. 1; *Harts* v. *Brown*, 77 Ill. 226; *Reichwald* v. *Hotel Co.*, 106 Ill. 439; *Buell* v. *Buckingham*, 16 Iowa, 214 (opinion by Judge DILLON); *Garrett* v. *Plow Co.*, 70 Iowa, 697, 29 N. W. 395; *Smith* v. *Skeary*, 47 Conn. 47; *Bank* v. *Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Pa. St. 314; *Sargent* v. *Webster*, 13 Metc. (Mass.) 497; *Hallam* v. *Hotel Co.*, 56 Iowa, 178, 9 N. W. 111.

The supreme court of Alabama is equally pronounced against this "trust-fund" doctrine, and in a very able and elaborate opinion, filed as recently as April of the present year, it expressly repudiates such doctrine, and overrules a number of cases in which its existence had been recognized by that court. The learned judge who writes the opinion says: "There is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relations to the creditors of such corporation as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual or partnership, and is or is not to be impressed with a trust character upon the circumstances and under the same conditions in the first case as in the latter two." *Jewelry Co.* v. *Volfer* (Ala.), 17 South. 525. In the still more recent case of *Thomson-Houston Electric Light Co.* v. *Henderson, Electric & Gaslight Co.*, 21 S. E. 951, the North Carolina supreme court deliberately rejected the "trust-fund" theory, and declared generally that the relation between a corporation creditor and the corporation, whether solvent or insolvent, is simply that of creditor and debtor, and that the creditor had no equitable claim upon the corporation assets either because it was a corporation or because it was insolvent. The supreme court of Indiana has lately made the same expression in emphatic terms in *First Nat. Bank of Crawfordsville* v. *Dovetail, B. & G. Co.*, 40 N. E. 810, and in the same further held (bearing upon the first question discussed in this opinion) that "the fact that one lending money to a corporation knew that it was to be used by the directors for

a purpose involving a breach of trust does not impair the validity of the judgment against the corporation in his favor for the amount loaned, entered by the corporation's consent, with the purpose of creating a preference." In Burrill, Assignm. (5th. Ed.) Sec. 64, it is said: "It has been objected * * * that on the happening of its insolvency the corporation and its agents became trustees for the creditors, who where entitled to a ratable payment out of the trust fund in proportion to the amount of their debts. This position, however, has not been sustained, and apart from statutory provisions, no distinction exists between an individual and a corporation in regard to the exercise of the power of conferring preferences."

Without quoting from other cases, in which very wise and thoughtful judges have announced similar views, I am satisfied to say that to me they seem right in principle. If, for any reason, there should be a discrimination between different classes of debtors in respect to the right to make preferences among their creditors, as said by Judge DILLON in *Buell* v. *Buckingham*, *supra*, the rule should be declared by the legislature, which has the constitutional power to make and change the law, and not by the courts, which have no such power. It may be remarked, however, that as to some of the cases cited generally in support of the contrary doctrine they were controlled by local statutes which unfortunately are not mentioned, or at least not made prominent, in the opinion. For instance, both Ohio and Texas cases are cited as opposed, and *Rouse* v. *Bank*, 46 Ohio St. 493, 22 N. E. 293, and *Lyons-Thomas Hardware Co.* v. *Perry Stove Manuf'g Co.*, 86 Tex. 143, 24 S. W. 16, do so read, but in each state there was a statute declaring that any transfer of property as a preference by a debtor who is insolvent "or in contemplation of insolvency" shall not be valid as against an assignment then in contemplation for the benefit of creditors. What influence, if any, this declared policy of the state law had upon the treatment of the general question by

the courts we do not know. I have read with interest what Mr. Thompson says upon this question in his recently published work on Corporations. He is an author of acknowledged learning and ability. Upon all matters he expresses his personal views positively and clearly, and usually courteously and dispassionately; but his treatment of this question, his characterization of the deliberately declared opinions of eminent courts and judges as "the mouthings of judges" with "low conceptions," "destitute of a sense of justice," and other similar flippancies, evince such a degree of morbidity upon this subject as greatly to compromise the value of his opinion. He says (Sec. 6496) the "fallacy" of the conclusion to which these thoughtless judges have "jumped" is in overlooking "the fact that the analogy between an individual and an insolvent corporation wholly fails in this: that although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may, by so doing, hinder and delay the others, yet he merely delays and hinders them; he does not, by that act, destroy himself; he still lives; and he may, and often does, get on his feet again, and acquire property, and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the object of its creation, and dispossesses itself of all its property, it destroys itself, and becomes *ipso facto* dissolved." In his zeal to demonstrate the "fallacy," has not the learned author allowed himself to start from unstable premises? Is it entirely safe to build upon the foundation that when a corporation becomes insolvent, "and dispossesses itself of all its property, it destroys itself, and becomes *ipso facto* dissolved?" In Sec. 6483 of the same book he has told us that "the assignment by a corporation of all its property for the benefit of its creditors does not extinguish it as a corporation, or disable it from maintaining an action, unless the subject-matter of the action passed from it by the assignment." In this latter statement he seems well sup-

ported by authority, though Judge STORY, in a dissenting opinion in *Beaston* v. *Bank*, 12 Pet. 138, intimated a contrary opinion. See Burrill, Assignm. (5th Ed.) Sec. 64; Ang. & A. Corp. Sec. 770; and cases cited by each of these authors. The law is generally recognized to be, as stated by Mr. Thompson, that neither the insolvency of nor a general assignment by a private corporation works its dissolution. An individual debtor, stripped of his means for satisfying his debts, "still lives"; but it is just as true of a corporation. Each is still a living debtor without present ability to pay his or its debts. It is probably true that an individual debtor is more likely to "get on his feet again," but that is incidental merely, and does not prove or tend to prove any difference in their legal status. The possession of property is no more essential to the existence of a corporation than it is to the existence of a man. If a corporation becomes insolvent, there is nothing to prevent its members, until its dissolution is legally declared, from furnishing more funds, and proceeding to use its corporate powers. Mor. Priv. Corp. Sec. 1010, and citations. My conclusion is that the hardware company, although insolvent, might legally prefer Deyette as a creditor, and that his judgment, founded on a good consideration, was not invalid or unenforceable on account of such preference.

As to Lewis and his judgment, the facts established by the findings are the same, except that at the date of his judgment and before—but how long before is not found—he was a director and secretary of the company. He, too, loaned money to the company for the purpose of buying the Trask stock and it not being shown that at the time of such loaning and purchase he had any connection with the company, he, as a creditor, would stand upon the same footing as Deyette, except that when his judgment was confessed he was a director and officer of the company. On the 9th day of May the company confessed these judgments—one to Deyette, already considered; one to Foster, over which there seems

to be no controversy; and one to Lewis, now in hand. Lewis himself executed these confessions as secretary of the company. Executions were issued on these judgments, and levied upon the personal property of the hardware company, but when issued or when levied does not appear. On the 12th, execution was also issued on respondent's judgment. The property was sold, and the proceeds which are "not sufficient to pay the judgments against the Hicks-Trask Hardware Company prior to the judgment of plaintiff" (respondent), are held by the sheriff "to be applied on said executions according to the decree of this court." It not appearing that executions were issued on other judgments than those named, we understand from the language of the findings that the proceeds are insufficient to pay the three judgments first named. The Foster and the Deyette judgments being good, and entitled to be paid, the contest is over the balance in the hands of the sheriff, and between Lewis and the respondent. While the findings do not expressly show—as we wish they did—when the execution on the Lewis judgment was issued or levied, it must have been prior to the issuance of respondent's execution, for the property appears to have been sold under the Lewis, Foster and Deyette executions. The fact that the company was insolvent, that it confessed these three judgments on the 9th, and that three days thereafter it confessed judgment to quite a number of other creditors, including respondent, and that executions were issued and levied on the first three judgments either prior to or on the 12th, the date of the subsequent judgments, and before respondent's execution, issued immediately upon obtaining its judgment, is very convincing, though perhaps not incontestible, evidence that it was intended that Foster, Lewis and Deyette should be given a preference over other creditors. I have no doubt that it was so designed. So that the question now in hand is, could the company legally prefer Lewis, a director, and one of its managing officers, on account of an indebtedness not contracted on the strength of

such preference, but for a general antecedent indebtedness? I think that we can hold that it could not, consistently with what I have already said in respect to the right generally of an insolvent corporation to prefer creditors. While the directors and officers of a corporation, solvent or insolvent, are not in any proper sense the trustees of the creditors, they do occupy a relation to them demanding the utmost good faith on their part in the handling of the corporation assets. To their honesty and fair dealing with the property, and to their just and prudent management of the business, the creditors must look for their continued security. As in the case of others occupying a fiduciary position, they cannot innocently sacrifice the interests of those who trust them to their own personal advantage. As managers of the corporation and its property, they owe a duty to those dealing with them, which they violate when, to the detriment of those who confide in them, they make themselves preferred beneficiaries in the disposition of assets which without such preference, would be available alike to all creditors. They hold in their hands the property of the corporation to which creditors must look for satisfaction of their claims and come within the just principle that one who has possession and control of property for the benefit of others besides himself may not dispose of it for his own special advantage, to the injury of others,for whom it is also held.

The judgment in this case was confessed. Lewis himself as secretary of the company executed the confession to himself. It was not a hostile proceeding against the company in which he acted as a creditor only, but was a voluntary effort on the part of the company, executed through and by him as its secretary, to give himself an advantage over creditors generally, with no equities to justify such preference, except that he was a general creditor on account of an antecedent indebtedness. I do not think such a preference should be sustained.

In many of the states which recognize the general right

of an insolvent corporation to make preferences among its creditors, such preferences in favor of its own directors on account of antecedent indebtedness, in the absence of special equities are not sustained. See *Gottlieb* v. *Miller,* 154 Ill. 44, 39 N. E. 992, where a preference was sustained as to outside creditors, and set aside as to directors. See, also *Lippincott* v. *Carriage Co.,* 25 Fed. 577, where a large number of cases are cited to the point that directors and managing officers cannot be preferred. *Montgomery* v. *Phillips* (N. J. Err. & App.) 31 Atl. 622, followed in *Mallory* v. *Kirkpatrick* (N. J. Ch.) 33 Atl. 205; *Henderson* v. *Trust Co.* (Ind. Sup.) 40 N. E. 516; *Corey* v. *Wadsworth* (Ala.) 11 South. 350. See, also, upon this a valuable note to *Lyons-Thomas Hardware Co.* v. *Perry Stove Manuf'g Co.* (Tex. Sup.) in 22 Lawy. Rep. Ann. 802, 24 S. W. 16, in which the editor's conclusion is thus stated: "On examination of the decisions, it is clear that the weight of authority is overwhelmingly in favor of the legality of preferences to ordinary creditors, except as restricted by statute, and overwhelmingly against the validity of such preference when made in favor of directors."

The trial court held the Lewis judgment invalid, both because of the invalidity of its consideration and because it was the result of an attempt to give preference to a director. For reasons stated early in this opinion, I think the first ground untenable. As to the second ground, I am of the opinion that he, being a director, and one of the managing officers of the company, ought not to get any advantage in the nature of a preference, but that the court was wrong in holding his judgment void and in denying him participation in the distribution of the proceeds of sale in the hands of the sheriff. This seems to be the policy of our statute. If, by a general assignment, this preference had been attempted in favor of Lewis, the preference would have failed, but he would still have been entitled to share ratably with other creditors. Comp. Laws, §4660. I think there is much in the

majority opinion that is sentimentally good and wholesome, but that the text from which it is elaborated cannot be found anywhere in the facts returned by the trial court, or of which we have any judicial knowledge.

Finally, I cannot quite understand how the court, having deliberately declared that the assets of this corporation, being insolvent, constitute a fund for ratable distribution among its creditors without preference, can affirm this judgment, which gives to this respondent creditor practically the entire assets of the corporation, in the face of the record showing other creditors, whose judgments were confessed at the same time, and which must go unpaid. This is an equitable action in the nature of a creditors' bill in behalf of this plaintiff only, and the remark of Judge THAYER in *Walker* v. *Miller,* 59 Fed. 871, seems pertinent: "If this trust-fund theory is to be adopted to prevent the corporation from granting a preference because of its insolvency, we know of no reason why it should not be invoked to keep attaching creditors at bay, and thus relegate the disposal of the fund, so far as judicial proceedings are concerned, to a court of equity." See, also, *Mallory* v. *Kirkpatrick, supra.*[3]

[3] *For other cases involving preferences to officers or stockholders of a corporation.* See Amer. Dig. tit. Corporations, Key, No. 545; 12 Cent. Dig. tit. Corporations, §§ 2170-2175. Also, 10 Cy. C. 1251-1258.

CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD CO. *v.* THIRD NATIONAL BANK OF CHICAGO.

In the Supreme Court of the United States, 1890.

134 *United States Reports*, 276.

On April 1, 1880, resolutions were passed by the stockholders of the Chicago and Pacific Railroad Company, authorizing the leasing of its property and franchises to the Chicago, Milwaukee and St. Paul Railway Company, and also the execution of a new mortgage; and on the next day, the first-named company executed its lease to the last-named company, and the two companies executed a joint trust deed upon the same property to secure the payment of $3,000,000 of bonds, payable in thirty years. By the lease, which was for 999 years, the lessor (which will for convenience be called the Pacific Company) not only disabled itself from performing the functions and discharging the duties of its incorporation, but also transferred all its property and franchises to the lessee (hereafter called the Milwaukee Company). The consideration of the lease was $1.00, and the performance of the convenants of the lease by the lessee. The Pacific Company was largely indebted outside of the amount secured by the trust deed; it therefore surrendered to the Milwaukee Company all the means it had of discharging its indebtedness. Among the recitals in the lease were these:

"Whereas certain other parties to whom the said party of the second part was so as aforesaid indebted have prosecuted their several demands in the Superior and Circuit Courts of Cook County, and other courts of the State of Illinois, and have procured divers judgments thereon, which now remain unpaid and unsatisfied of record, and are a lien upon the property of the said party of the first part,

and other of said demands still remain unliquidated; and whereas the said party of the second part, at the request of the said party of the first part, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale, and to protect said property from all the aforesaid valid judgment liens, and also to extend and construct the road of said party of the first part to the Mississippi River; . . . and also to pay all taxes, charges, or assessments imposed or assessed, or which may be hereafter imposed or assessed, upon the property or premises of the party of the first part."

And among the covenants of the lessee were these:

"The said party of the second part, in consideration of the said demise and lease so as aforesaid made by the said party of the first part, hereby covenants and agrees that it will take up, pay, cancel, satisfy and discharge the said three thousand bonds of one thousand dollars each at maturity thereof, and will pay, cancel and discharge each and every of the coupons or interest warrants attached to the said bonds, and each of them, as the same shall become due and payable, so as aforesaid to be made and issued to the parties of the first and second parts and will, during the continuance of this lease, at all times save the said party of the first part free and harmless therefrom, and from the mortgage so as aforesaid to be executed by the said parties of the first and second parts to the Farmers' Loan and Trust Company, on the second day of April, 1880, . . . and the said party of the second part shall and will, at its own proper cost and expense, preserve and keep the railway and premises hereby demised, and every part of the same, in thorough repair, working order and condition, and supplied with rolling-stock and equipment, so that the business of the said demised railway shall be preserved, encouraged and developed. . . . The said party of the second part hereby covenants, promises and agrees

to and with said party of the first part that at the end of said term, or other sooner determination of this said lease, the said party of the second part shall re-deliver and surrender up to the party of the first part, its successors or assigns, the said demised railway and premises in as good order and condition as the same shall be delivered to the said party of the second part under this lease, and with such additions, betterments and improvements as shall have been made thereto."

The bonds were sold at ninety-seven cents, and the amount necessary to redeem from the foreclosure sale was about $1,100,000. Out of the proceeds of these bonds the Milwaukee Company not only completed the construction of the entire road authorized by the charter of the Pacific Company, from Chicago to the Mississippi River, but also constructed a bridge over the Mississippi River, so as to connect this road with its own line in Iowa. The Chicago Bank, a judgment creditor of Pacific Company sought by a cross bill in certain equitable proceedings instituted by the two companies to have its judgment paid by the Milwaukee Company.

The court in its decree, ordered "that the Chicago, Milwaukee and St. Paul Railway Company pay in to the clerk of this court, within thirty days, a sum of money sufficient to satisfy the judgment, costs and interest rendered in favor of the Third National Bank of Chicago against The Chicago and Pacific Railroad Company, including also the amount, with interest, paid by the Third National Bank of Chicago to the United States marshal for the Northern District of Illinois, to redeem from the sale to Albert Keep as aforesaid; and it is further ordered, adjudged and decreed, that in case the Chicago, Milwaukee and St. Paul Railway Company shall fail to pay said sum of money aforesaid within said thirty days, the Third National Bank of Chicago may move the court for the appointment of a receiver, with the usual power of receivers, to take possession

of the said leased property and to operate it until the amount due to the said Third National Bank of Chicago upon its judgment as aforesaid, with costs and interest thereon, and the amount, with interest thereon so paid by the Third National Bank of Chicago to the United States marshal for the Northern District of Illinois, to redeem from said sale to Albert Keep, is paid out of the earnings of said road, and for any other proper relief."

From this decree the Chicago, Milwaukee and St. Paul Railway Company appealed.[1]

Mr. Justice Brewer. Upon the facts can the validity of the decree requiring the Milwaukee Company to pay to the bank, within a specified time, the amounts of the two judgments held by it be successfully questioned? We think not. It would perhaps be difficult to point out any separate clause in the lease by which the Milwaukee Company obligated itself to pay the judgment in favor of the bank, and yet there is force in the contention that, taken as a whole, the instrument casts this burden upon the company. A part of the subject matter of the contracts was claims against the Pacific Company. One recital is of the foreclosure debt; immediately following is one of the existence of claims, some of which had been sued on and passed into judgment and become liens, others still unliquidated; followed by the recital that the purpose of this arrangement is the redemption from said foreclosure sale, and the protection of the property from all the aforesaid valid judgment liens. Narrowly, the valid judgment liens referred to may include only those already existing, mentioned in the preceding recital; or, broadly all valid judgment liens perfected on the claims named in that recital, whether already in judgment or not. If these were all the provisions, the narrow construction might be preferred; but the further and express covenants

[1] The facts are in part restated, and the Reporter's notes of the argument of counsel omitted. Only so much of the facts and the opinion are given as relate to the substantive rights of the creditors of the Pacific Company against the Milwaukee Company.

of the Milwaukee Company were to pay and discharge fully the proposed indebtedness of $3,000,000, and to return at the end of the lease, to the lessor, the demised property. Does not this indicate that the understanding and intent were that the Milwaukee Company should discharge all judgment liens founded upon existing claims, whether such liens had already been perfected, or should be created in subsequent suit? A judgment after a lease does not of its own right defeat the lease, or deprive the lessee of his interest and possession; but it operates against the lessor, and whatever interest, great or small, is retained in the leased premises. The purpose of this stipulation was not the protection of the lessee, but of the lessor. It was not that the lessee should be able to retain and enjoy the possession during the terms of the lease; but that the property should be freed from all burdens, so that at the termination of the lease the lessor might retake and enjoy it. The scope of the contract was not the payment of the debts of the lessor, for a mere debt, never passing into judgment, casts no burden upon the interest of lessor or lessee in the property, and the removal of all burdens was apparently the intent of the contracting parties. But again, the express lien on the lessor's property amounted only to about $1,100,000; yet, by the arrangement, a new lien was created from which nearly $3,000,000 was received, all of which sum passed into the hands of the lessee. Will not equity, for the payment of the debts of the lessor, follow this surplus into the hands of the lessee? Can a corporation in debt transfer its entire property by lease, so as to prevent the application of the property, at its full value, to the satisfaction of its debts? *Central Railroad* v. *Pettus*, 113 U. S. 116, 124; *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 366. We do not care to pursue an inquiry into this question at length, or consider what limitations would surround this doctrine as applied generally, preferring to notice a single matter, which is significant and decisive. The contracting parties arranged

not merely for the discharge of the foreclosure lien, but for the completion of the road for which the lessor's franchise was granted. The lessee not only performed these stipulations, but with moneys arising from the sale of these bonds built, for its own benefit, a bridge across the Mississippi River, connecting this road with its line in Iowa, and thus making a continuous line of road to Omaha. Neglecting to pay the debts of the lessor, it appropriated a large amount of the proceeds of the trust deed upon the lessor's property to its own benefit, and the improvement of its own property. Here clearly was a diversion of funds, which the creditors of the lessor might follow in equity. This is only the application of familiar doctrine. The properties of a corporation constitute a trust fund for the payment of its debts; and, when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted. The Milwaukee Company, from securities on the property of the Pacific Company, received nearly three millions of dollars; part it used for the benefit of the lessor company, and part it appropriated to its own benefit. Can it do this, and let the lessor company's debt go unpaid? Equity answers this question in the negative, and such was the ruling of the circuit judge. 26 Fed. Rep. 820. * * *

Decree affirmed.

VANCE *v.* McNABB COAL AND COKE CO.

IN THE SUPREME COURT OF TENNESSEE, 1892.

92 Tennessee Reports, 47.

The McNabb Coal and Coke Co. sold and transferred all its property to the Consolidated Coal and Iron Co., the only real consideration moving to the McNabb Company being $400,000 of the stock of the Consolidated Company, which stock was not paid to the McNabb Company, but distributed among the stockholders of that company. The Consolidated Company had no other property or capital of any kind except what it received from the McNabb Company. The McNabb Company sold 115,000 of its bonds to C. W. Short for $115,000. Short, however, paying $20,000 of this sum to the Consolidated Company. The Consolidated Company then mortgaged its property to the Farmers' Loan and Trust Co. to secure an issue of $300,000 of bonds. This bill was filed by the creditors of the McNabb Company to set aside the conveyance of its property and to wind up its affairs as an insolvent corporation. The chancellor adjudged that the McNabb Company was indebted to various creditors in separate sums aggregating $4,358.92. He further adjudged that the $20,000 paid to the Consolidated Company by C. W. Short was an asset of the McNabb Company, and that the plaintiffs should recover of the former company $4,358.92. Both the plaintiffs and the Consolidated Company sued out writs of error.[1]

CALDWELL, *J.*: * * * It is perfectly obvious that the decree is appropriate, and rested upon sound reason, as far as it goes. The $20,000 paid by Short to the Consolidated Coal and Iron Company, was part of the consideration due from him to the McNabb Coal and Coke Com-

[1] The facts are restated from the opinion of the Court, and that part of the opinion in which the facts are set forth at length is omitted.

pany for its $115,000 of bonds purchased by him, and, as a consequence, the Consolidated Coal and Iron Company had no legal right whatever to the money. Its receipt and holding of the money, under whatever claim or pretense, was, in legal contemplation, for the use of the true owner, the McNabb Coal and Coke Company. By taking the money into its treasury, the Consolidated Coal and Iron Company became, as it were, a trustee in its own wrong for the benefit of the creditors of the McNabb Coal and Coke Company, and in that capacity it must be held responsible in a court of equity.

It is quite as clear that the Chancellor did not go far enough in the measure of relief granted.

By every rule of law and equity the $400,000 of capital stock issued by the Consolidated Coal and Iron Company to the share-holders of the McNabb Coal and Coke Company belonged to the latter company in its corporate capacity, as assets for the benefit of its creditors in the first instance. That stock was the only consideration actually passing from the purchasing to the selling company for its property, and could not rightfully be appropriated by share-holders, as was done, to the detriment of creditors.

The consideration of the deed of February 22, 1887, though that deed did not cover all the property, was, as has already been seen, not less than $1,000,000 of paid-up capital stock, to be issued to the McNabb Coal and Coke Company. The option contract, made with McNeale and Donohue some five or six months later, recited that $400,000 of the capital stock in the proposed "new corporation" should be issued to the "McNabb Coal and Coke Company as part of the purchase-price;" and by the final proposition, under which the Consolidated Coal and Iron Company claim to have acquired the whole property, the $400,000 of stock provided "for the benefit of the parities interested in the McNabb Company," was to be held "in accordance with the terms agreed upon" by the parties to the option contract, which, as

just seen, recited that it should go to the "McNabb Coal and Coke Company as part of the purchase-price."

Then, treating the sale and purchase of the property as in every way legitimate and binding, the $400,000 of stock was a part of the price paid, and, as such, belonged primarily to the selling company, and not to its share-holders as such. Therefore, the persons receiving and appropriating that stock were guilty of a conversion, and thereby became individually responsible to the creditors of the McNabb Coal and Coke Company, each for the value of the shares taken by him.

After stating that equity regards the property of a corporation as held in trust for the payment of its debts, the Supreme Court of the United States, in a well-considered case, said: "Assets derived from the sale of the capital stock of the corporation, *or of its property*, become, as respects creditors, the substitutes for the things sold, and, as such, they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company, and the division of the proceeds of the sale among the stockholders, will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors, in that event, may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts out of the money so received and in their hands." *Railroad Company* v. *Howard*, 7 Wallace, 410.

To the same effect is *Carson* v. *State of Arkansas*, 15 Howard, 527; 2 Story's Eq. Jur., Sec. 1252, and other authorities there cited.

But complainants are entitled to more comprehensive relief than any yet mentioned. The deed and other contracts by which the McNabb Coal and Coke Company undertook to pass the title to all its property to the Consolidated Coal and Iron Company are fraudulent and void as against creditors of the former company.

The Consolidated Coal and Iron Company was organized by the sanction and concurrence, if not solely at the instance, of the officers of the McNabb Coal and Coke Company, for the express and single purpose of acquiring the latter's property; and the transition was soon accomplished, mainly through the efforts of those same officers, who, in the meantime, had become directors in the other company.

Moreover, the Consolidated Coal and Iron Company did not pay, or assume to pay, anything for all this valuable property, save the nominal consideration of one dollar. True, it bound itself to issue a small part of its stock to the McNabb Coal and Coke Company, but that, under the facts of this case, did not constitute a valid consideration, or relieve the transfer of the just imputation of fraud; for the only basis of its stock was the property received from the McNabb Coal and Coke Company. That stock had nothing else to rest upon or to give it value; from no other source did the Consolidated Coal and Iron Company receive a dollar of capital either in money or property. At best, it is but an effort to make a sale whereby the purchase-price is to be paid by a return to the seller of a small part of the property sold, and the buyer is to retain the larger part and pay nothing for it.

The president of the McNabb Coal and Coke Company says the consideration received by that company for its property was the different sums of $60,000, $35,000, and $20,000, paid by C. W. Short. But that cannot be so; first, because the deed was executed long before he paid those sums, and upon an entirely different consideration; and, secondly, because he made those payments as the consideration for the $115,000 of bonds purchased by him. The only connection those payments had with the sale of property to the Consolidated Coal and Iron Company lies in the fact that he received of that company's stock a *bonus* of $200,000, by previous agreement with McNeal and Donohue as owners of an option, which was never made available, except as to the sale of the bonds.

The truth is, that by a series of unusual offers and agreements, one corporation, while largely indebted and without providing for its creditors, has, without a valid consideration, denuded itself of all its property, and vested the same in another corporation, conceived and brought into existence for the sole purpose of such successorship.

A transaction of that kind will not stand for a moment against creditors of the former corporation, but they may follow and subject the property in the hands of the latter corporation, the same as if no transfer had been made. Only the rights of subsequent innocent purchasers for value can intervene and prevent that result.

This is a familiar principle of law with reference to fraudulent conveyances, applicable to corporations and individuals alike:

"Corporations cannot, any more than individuals, relieve their property from the payment of debts, except by a sale and transfer in good faith, and for a full consideration." *Rorke* v. *Thomas,* 56 N. Y., 563; *Wabash, St. Louis & Pacific Railway Co.* v. *Ham,* 114 U. S., 594; 2 Morawetz on Private Corporations (2nd Ed.), Sec. 789.

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser." *Railroad Company* v. *Howard,* 7 Wallace, 409; *Carson* v. *State of Arkansas,* 15 Howard, 507; *Graham* v. *Railroad Company,* 102 U. S., 161; 2 Story's Eq. Jur., Sec. 1252; Wait on Insolvent Corporations, Secs. 150 and 156; 2 Morawetz on Private Corporations, Sec. 789; *Chicago Railway Company* v. *Chicago Bank,* 134 U. S. 287.

In *Hibernia Insurance Company* v. *St. Louis and New Orleans Transportation Company* the Court, as correctly stated in the head-note, held that "equity will not permit the stockholders in one corporation to organize another, and

transfer all the corporate property of the former to the latter, without paying all the corporate debts;" and that, "where such a transfer is made, the obligations of the old corporation may be enforced against the new to the extent of the assets received by it." 13 Fed. Rep., 516.

In another case, where it appeared that no fraud was intended by either party, the Court held that "a new corporation which takes, as owner, all the property and assets of an old corporation (which is dissolved without providing for all its debts), must pay the debts of the old corporation, at least to the amount of the assets converted." 16 Fed. Rep., 140.

Though the transfer of its property by the McNabb Coal and Coke Company was inoperative and void as to complainants, they are not entitled to a sale under their attachment, because the proof discloses the existence of a mortgage upon the attached property prior in date to the filing of the bill, and the mortgagee is not before the Court. The validity of the mortgage is not impeached in the bill. In fact, its existence seems not to have been known to complainants until disclosed in the proof, and they did not then attack it by amendment, as they might have done upon proper ground.

Complainants may elect to ratify the transfer of its property by the McNabb Coal and Coke Company, and recover the value of the $400,000 of stock from the persons receiving it; or they may avoid the transfer altogether, and pursue the property or its proceeds in the hands of the Consolidated Coal and Iron Company, subject to any rights that may have been acquired by subsequent *bona fide* purchasers for value.

Enter decree in accordance with this opinion, and allow sixty days for defendants to pay into this Court the amount of debts adjudged, with interest and costs. If such payment should not be so made, the cause will be remanded for further appropriate proceedings.[2]

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[2] *Compare*: *Railroad Company* v. *Howard*, 74 U. S. 392. 1868.

(The A Company was not worth $5,500,000. Its mortgages amounted to $7,000,000, and it had other debts. An agreement was made between the A Company, the B Company, the stockholders of the A Company and the bondholders of the A Company, that the B Company would pay $5,500,000 for the property of the A Company; that the different bondholders would receive from 100 to 30 per cent. of their claims, and the stockholders of the A company 16 per cent. of the face value of their stock. The offer of the B Company was conditional on rapid delivery of a good title and the method proposed was the only one that all parties interested could agree on. C, a judgment creditor of the A Company, brought a bill in equity for payment of the money which was to go to the stockholders. Court decreed that this money should not be paid to the stockholders, but to a receiver for the benefit of the creditors, even though had foreclosure of the mortgages proceeded in regular course the unsecured creditors would have received nothing.)

The Missouri Lead Mining and Smelting Co. v. *Reinhard,* 114 Mo. 218, 1892. (The A Company assigned all its property to the B Company, the consideration being stock of the B Company, which was distributed among the stockholders of the A Company. Persons not stockholders of the A Company at the same time subscribed and paid for the remaining stock of the B Company. At the time of the assignment no provision was made for a disputed claim of C's against the A Company, but the assignment was not an effort to avoid paying this claim. Five years afterwards C secured a judgment on this claim against the A Company. *Held,* that C had no right to have the assignment set aside, but that as the B Company purchased with knowledge of C's claim, in equity the B Company was liable for C's claim.)

For other cases on conveyances made when insolvent or in contemplation of insolvency, see Amer. Dig., tit. corporations Key, No. 524; 12 Cent. Dig., tit. corporations, Secs. 2154-2160.

A general discussion of the "Trust Fund Theory" by one of the editors (G. W. P.) will be found in American Law Register and Review. (Now University of Pennsylvania Law Review), Vol. 43 (Vol. 34 N. S.), p. 448, 456,*et seq.* (1895).

CHAPTER XIV.

PROBLEMS OF SET OFF.

SECTION 1.—PARTNERSHIP CASES.

SLIPPER *v.* STIDSTONE.

IN THE COURT OF KING'S BENCH, 1794.

5 *Term Reports*, 493.

To this action for work and labour done by the bankrupt, goods sold and delivered, and money lent by him, the defendant pleaded the general issue, and gave a notice of set-off for work and labour of the defendant and one *P. Abbot* since deceased, whom the defendant survived, by them performed for the bankrupt, &c. At the trial before Lord *Kenyon*, the sum set off exceeded the plaintiff's demand, upon which the plaintiff was nonsuited, though it was contended on his behalf that the set-off was in *autre droit*, and ought not to be allowed in this action.

Law on a former day in this term moved to set aside the nonsuit, contending that the set-off should not have been allowed, for that there was no mutuality of debt; that the fund out of which the satisfaction was to be made by the plaintiff to the defendant as surviving partner, was not the same as that from which satisfaction was to be made to the plaintiff by the defendant; that the only mutuality here consisted in the persons of the plaintiff and defendant; that before the death of *Abbot* it could not be pretended that the debt due from the plaintiff to him and the defendant could be set off in an action against the defendant; and that, on

principle, the death of *Abbot* could not vary this question. That this set-off could not be permitted any more than a debt due from the plaintiff to any person to whom the defendant happened to be executor; and that if this set-off were allowed, it would create confusion in the arrangement of the costs of the different suits.

The Court then granted a rule *nisi:* but on this day they recommended it to the plaintiff not to draw up the rule, as it would only enhance the expence of the suit, the question being perfectly clear with the defendant. They said that the defendant might have declared against the plaintiff for this demand, and also for any sum due to him separately, if any such had been due; and that therefore there was no reason why the set-off should not be allowed.

Rule refused.

FRENCH *v.* ANDRADE.

In the Court of King's Bench, 1796.

6 *Term Reports*, 582.

This was an action upon promises; to which the defendant pleaded that the plaintiff and one *J. Newton* who died before the commencement of the action were indebted to the defendant in divers sums of money, &c., for work and labour, money paid, &c.; that those sums remained unpaid at the death of *J. Newton*, and at the time of commencing this action were and still are due from the plaintiff to the defendant; and that they exceed the sum due from the defendant to the plaintiff, against which sum the defendant is willing to set-off, &c.

To this plea there was a general demurrer.

Marryat, in support of the plea, mentioned the case of *Slipper* v. *Stidstone* as decisive of the present; which *Wood contra* admitted.

Per Curiam. It is perfectly clear that the debt due from the plaintiff as surviving partner may be set-off against the demand he has in his own right on the defendant.

Judgment for the defendant.

ADDIS *v.* KNIGHT.

IN THE HIGH COURT OF CHANCERY, BEFORE SIR WILLIAM GRANT, MASTER OF THE ROLLS, 1817.

2 Merivale's Reports, 117.

Joshua Knight, deceased, carrying on trade in partnership with his brother, the Defendant *Edward Knight,* on the 18th of *August,* 1801, shortly after the marriage of his daughter with the Plaintiff, advanced to the Plaintiff £1200, on his bond, payable to *Joshua Knight,* his Executors, &c.

During the partnership, which continued to the death of *Joshua,* and up to the time of his death, the partners were in the habit of drawing bills upon the Plaintiff for their accommodation, which bills the Plaintiff always accepted, without any valuable consideration, on the credit (as he alleged) of his father-in-law, and in the confidence that he could set off at any time to the amount of his bond.

Joshua Knight died in *June,* 1809, having made his will, and appointed the three Defendants his executors, who proved the same.

On the 23d of the same month, a commission issued against the Defendant *Edward Knight,* as surviving partner; under which he was declared bankrupt, and an assignment made of his separate estate, and also of the partnership estate.

At the time of *Joshua's* death, and of the commission issued, the partnership was indebted to the Plaintiff £8029 in respect of his acceptances, of which £5983 13*s.* was discounted at the Bank, and the remaining £2045 7*s.* paid away by the partnership, the whole of which the Plaintiff was then liable to pay, and afterwards actually paid, to the holders of those bills upon application made to him.

The Plaintiff proved the £2045 7*s.* under the commission on the joint estate; and the Bank were admitted to

prove in joint exoneration of the Plaintiff's liability upon the several other acceptances, to the amount of £5983 13*s.* Dividends were received on both proofs, by which the sum proved by the Plaintiff was reduced to £1840 15*s.* 6*d.*, and that proved by the Bank to £5385 6*s.* 10*d.* amounting in all to £7226 5*s.* 4*d.*, remaining due to the Plaintiff from the partnership.

The joint estate being insufficient to pay any further dividend, the Assignees under the Commission filed a Bill, on behalf of themselves and all other the joint creditors of the partnership who should come in and contribute, against the present Defendants as executors, and other persons having beneficial interests under the will of *Joshua Knight*, claiming (among other things,) to be paid the remainder of their debts out of the real and personal estate of the Testator, after payment of his separate creditors, and calling upon them to account for the same.

By the Decree at the Rolls, on the 26th of *January*, 1812, it was referred to the Master to take an account of the partnership debts, and it was ordered that the residue of the Testator's personal estate, after payment of his separate debts, should be applied in payment of such partnership debts as should remain unsatisfied after applying the whole partnership estate in liquidation thereof, and, in case the personal estate should prove insufficient, then the Testator's real estate was declared to be liable, under the statute, to make good the deficiency, and an account thereof was also directed.

Under this Decree, the Plaintiff proved before the Master the balance of £1840 15*s.* 6*d.* remaining due on his proof under the commission; but, depending upon the Bank for carrying in before the Master the £5385 6*s.* 10*d.*, which was the balance due on the unsatisfied acceptances, in further exoneration of his liability, confined his proof to the former sum, and was called upon by the Bank to pay, and had since actually paid, the amount of those acceptances.

Under these circumstances, the Plaintiff, being indebted to the estate of *Joshua Knight* £1465, for principal money and interest on his bond, claimed a set-off for that amount on the £1840 15*s.* 6*d.* proved by him; but the Master refused to admit the claim; and the Plaintiff afterwards, understanding that it was the intention of the Defendants (the representatives of *Joshua Knight*) to bring an action against him on the bond, filed the present Bill, by which he prayed an injunction from proceeding on the bond, and a declaration that he was entitled to have the bond and interest deducted from or set off against the £5385 6*s.* 10*d.* due from the estate of *Joshua Knight,* and to receive payment or satisfaction in respect of the residue out of his assets, and that he might be admitted to prove the same against, or be directed to be paid the same out of, the said assets accordingly; for an account, if necessary; and that the bond might be delivered up to be cancelled.

The Defendants, by their answers, submitted whether the debt due from the joint estate to the Plaintiff was or was not a debt which ought to be considered due from and payable out of the assets of *Joshua Knight* only, contending that the debt due from the Plaintiff was a separate debt due and payable to the separate estate of *Joshua Knight,* and that the Plaintiff was not entitled to set off the bond-debt and interest against the said sum of £5385 6*s.* 10*d.,* but ought to pay the amount of principal and interest on the bond, upon payment whereof he would be entitled to receive his dividend upon so much as had been actually paid by him, rateably with the other creditors.

Hart and *Rose,* for the Plaintiff.

Admitting that the debt secured to *Joshua Knight* by the Plaintiff's bond remained due at law, and might be recovered by the representatives of *Joshua Knight* in an action, and that the debt due from the joint estate of *Joshua and Edward Knight* to the Plaintiff was extinguished at law as against *Joshua* by his death, and survived against

Edward only; contended that it nevertheless remained due in equity against the assets of *Joshua,* and that the Plaintiff had a right, in a Court of Equity, to be relieved against legal proceedings at the suit of *Joshua*'s representatives, while his equitable demand remained unsatisfied; and, in support of this argument, they cited *Stephenson* v. *Chiswell,* (3 Ves. 566), *Gray* v. *Chiswell* (9 Ves. 118), and Ex parte *Quintin* (3 Ves. 248), Ex parte *Stephens* (11 Ves. 24), and Ex parte *Hanson* (12 Ves. 346, and see 8 Ves. 232, 1 Rose, 156 and *Bradley* v. *Miller,* 1 Rose, 273), alleging that the first-mentioned case established the doctrine for which they contended, and that its principle was not contravened by any of the later decisions referred to.

Sir *S. Romilly, Leach,* and *Barber,* for different Defendants.

The MASTER *of the* ROLLS:

Upon looking into the cases which have been cited in support of the Plaintiff's demand, that of *Stephenson* v. *Chiswell,* is the only one which I find to be applicable; and, in the result, that case appears to be rather against the claim than in favour of it; for the demurrer was allowed. The cases of Ex parte *Stephens,* and Ex parte *Hanson,* only establish that, under certain circumstances, there may be a set-off in Equity when there can be none at Law. But it is quite clear that, as at Law a joint cannot be set off against a separate demand, the same rule prevails in Equity, and must continue to prevail so long as the present system, in regard to joint and separate estates, subsists.

The case of Ex parte *Quintin,* may be considered as an exception; but in Ex parte *Twogood* (11 Ves. 517, 519), the present Lord Chancellor expresses his disapprobation of that decision.

It is difficult to discover what was the precise equity sought in the case of *Stephenson* v. *Chiswell.* The Plaintiffs there claimed to retain their own debt until they should be divested of it by somebody having a better right to it

than themselves. But it is difficult to say what they would have considered a better equity than their own. Lord Rosslyn, it is true, uses some expressions which appear to be in favour of the present application; but the demurrer was to the whole relief sought, and its being allowed, was a refusal of that relief in any part and to any extent.

According to the scope of the argument, there would be hardly any rule by which the right of set-off can be ascertained. The criterion of set-off is supposed to be the purpose to which the debt is intended to be applied; since, if it is wanted for the payment of separate creditors, the Plaintiff does not pretend any right to retain; he claims to be entitled only in respect of its intended application to the payment of joint creditors. But he is not called upon to pay this debt, in the same character in which he would receive, as a joint creditor. His right is not co-extensive with his obligation. His obligation is to pay the whole; his right is to receive only a part; namely, his proportionate dividend with the other joint creditors.

Bill dismissed with costs.[1]

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[1] But even at law a person who is sued by one may set off a point and several obligation of the plaintiff and another to him. *Owen* v. *Wilkinson*, 5 C. B. N. S. 526, 1858.

WALN *v.* HEWES.

In the Supreme Court of Pennsylvania, 1820.

5 *Sergeant and Rawle's Reports,* 468.

This suit was brought by *Robert Waln,* surviving partner of *Jesse Waln* against *Josiah Hewes* and others, executors of *Joseph Anthony* deceased, in which a verdict had been found for the plaintiff against *Hewes,* for the sum of 970 dollars 39 cents, and judgment had been entered thereon. A motion was now made on behalf of *Hewes,* for a rule on the plaintiff to shew cause, why the amount of the judgment in this case should not be defalked out of a judgment obtained by *Hewes* against *Robert Waln,* in a suit brought in this Court to the present Term, for the sum of 5143 dollars 73 cents. *Hewes* was the only executor of *Anthony* who had assets, and he had paid them all over to the legatees of *Anthony,* at a time when there was not the least expectation of claims by creditors, without taking security. The ground of recovery against him in this as well as in other suits to a large amount, was an alleged fraud commited by *Anthony,* on several insurances of a ship in the year 1795. The plaintiff, *Robert Waln,* had executed a general assignment in trust for his creditors, on the 13th *September,* 1809.[1]

Gibson, J.:

The judgment now attempted to be defalked, was obtained against the plaintiff, not as a surviving partner, but for his separate debt. At law, it is clear, the remedy to recover on choses in action belonging to the partnership, survives; and the *surviving partner* may, therefore, set-off a debt due *to* him as such, against a demand on him in his own right. *Slipper* v. *Lane,* 5 Term Rep. 493: so the *defendant* may set-off a debt due *by* the plaintiff as *surviving partner,* against a demand due *to* him in his *own right.*

[1] The Reporter's notes of the arguments of counsel are omitted, as also the first part of the opinion, by Gibson, J.

French v. *Andrade,* 6 Term Rep. 528. So far the rights of the representatives of the deceased partner, and of the partnership creditors, are not affected. Where the surviving partner is a defendant *he* may set-off a partnership claim, because as respects the plaintiff he may treat it as his own: so where a person who is a surviving partner sues for *his separate* debt, the defendant may set-off a partnership debt against it. But there is no case to shew, that where the *suit* is for a *debt due to the partnership*, the defendant can set-off a debt *separately due by the plaintiff;* for though a surviving partner may chose to treat a partnership debt as due to him in his own right, it does not follow that a defendant sued for a debt separately due has a correspondent right: and even if he had such a right at law, I have no doubt chancery would, if the surviving partner were insolvent, interfere to prevent it from being exercised; and this on the same ground that it interferes to prevent an insolvent surviving partner from disposing of the stock, or getting in the outstanding debts; as was done in *Hartz* v. *Schrœder,* 8 Ves. jun. 317. Equity, I know, will, under special circumstances, allow a set-off where none can be at law, as in *Ex parte Stephens,* 11 Ves. jun. 24, and we find some chancellors have been disposed to go a good way in cases not very unlike the present. In *Ex parte Edwards,* 1 Atk. 100, Lord HARDWICKE inclined, under circumstances of extreme hardship, to suffer the separate debt of one of the partners to be defalked from a debt due to both jointly: but what finally became of the cause does not appear, and we therefore cannot tell what terms he had in view. And in *Ex parte Quinten,* 3 Ves. jun. 248, a separate commission having issued against one of the partners, and the other *having paid the joint* debts, a debtor to the partnership, who was also a creditor of the bankrupt, was permitted to set-off against the *bankrupt's share* of the joint debt, and to prove for the residue of his demand, the *solvent partner consenting to receive only his proportion of the debts due to the*

partnership. But in *Ex parte Twogood*, 11 Ves. jun. 587, this case was, as I take it, overruled, where set-off was denied under circumstances in all respects similar, except that the solvent partner had not paid the joint debts; but the effect of that circumstance was, in *Ex parte Quinten*, removed by the assent of the solvent partner to dispense with any right arising from it. However, be that as it may, equity will never allow a set-off of this sort without taking special care that no injury shall, in any possible event, happen to the rights of any one having a claim on the partnership; and in doing so, chancery has facilities by directing the accounts to be taken between the partnership and its creditors, and between the partners themselves, which this Court has not. A chancellor can call all the parties in interest before him, and bind them by a decree, that will do complete justice to every one: our equity means are limited, and for some purposes miserably deficient. Here we can impose no conditions, but must allow the set-off absolutely if at all; and to do so, might be to pay a debt due by the plaintiff out of the estate of his solvent partner, or out of the property of the general creditors. It does not appear, whether the joint debts are paid, or whether, if the accounts were settled, the plaintiff would be in advance to the concern. He insists he is; but that is denied by the representatives of the deceased partner, and on a motion of this kind we cannot settle the account. But the plaintiff does not say the partnership creditors are paid, and until that be done it is impossible to say how the balance may fall. Were it even certain the partners stood in all resepcts equal, still no more than the half of this judgment would belong to the plaintiff, and be a subject of equitable defalcation by his separate creditors. As it is, the money recovered here will go into the hands of the plaintiff's assignees, subject, in the first instance to all the rights of the partnership; and when the joint debts are paid and the partnership account is settled, but not till then, the separate creditors will have a

claim on it: whatever may then remain as a share of the plaintiff, will be subject to his separate debts; but at this stage of the business, we cannot interfere. This being an application to our discretion, we must take care so to exercise it, as not to invade the rights of *third persons*. The defendant's case is a very hard one; but the motion must be denied.

Motion denied.[2]

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[2] *Compare: Gordon* v. *Ellis*, 2 C. B., 820, 1846. (To assumpsit by A., B. and C. against D. for money had and received, D. pleaded, that, before the money had been received, &c., the plaintiffs carried on the trade of founders in partnership; that, while they were such partners, A., with the privity and concurrence of B. and C., employed D., an auctioneer, to sell certain property belonging to the firm; that, at the time A. so employed D. to sell the said property, and at the time of the sale thereof, and at the time when the debt after mentioned became due from A. to D., D. believed that A. was the sole and exclusive owner of the property, and had full power and authority to sell the same, and to receive the proceeds for his own sole use, D. having no notice or knowledge that B. and C. had any right or interest in the property; that, after A. had so employed D., and before D. had any notice that A. was not the sole and exclusive owner of the property, or of the proceeds thereof, A. became indebted to D. in a sum exceeding the moneys in the declaration mentioned, out of which D. was ready and willing to set off and allow the sums in the declaration mentioned. *Held,* that the plea was bad inasmuch that it did not allege that A appeared as sole owner of the property with the assent or by the default of his partners. For a case in which the person dealing with the partner was deceived by the action of his co-partners into believing that the debt was due from the partner separately, and the set off was allowed. See *Ross* v. *Deey*, 7 T. R., 361, note C.)

Billings v. *Meigs*, 53 Barb. 272, 1869 (A and B were partners. They deposited money with C. C at the request of A transferred part of the money to the individual account of A, C having reason to know that A's request was in fraud of B. *Held,* that C was liable to B for the full amount deposited by the firm. *i. e.* he, C, could not set off against the claim of the partnership his, C's, claim against A).

STEWART *v.* COULTER.

IN THE SUPREME COURT OF PENNSYLVANIA, 1824.

12 Sergeant and Rawle's Reports, 252, 445.

This cause was tried before Mr. Justice DUNCAN, at *nisi prius* in *April,* 1824, when it appeared that it was a suit brought by *Abraham Stewart,* against *John Coulter* and *William Day,* to recover a compensation for services, as supercargo of the ship *Coromandel,* on a voyage from *Philadelphia* to *Antwerp,* thence to *Java,* back to *Antwerp,* and thence to *Philadelphia.* The ship arrived in *Philadelphia* in *June* or *July,* 1819, and on the 18th of *August,* 1819, the plaintiff executed an assignment of his claim to *A. C. Salaignac* and *Cornelius Stevenson,* for whose use the suit was brought. On the trial, *Coulter* offered to set off a judgment, which he had obtained against *Stewart,* long prior to his assignment to *Salaignac* and *Stevenson;* and his Honour having admitted the set-off, the plaintiff moved for a new trial.[1]

GIBSON, J. For myself, I cannot admit that this set-off could be claimed *at law,* or that there is in this respect any material difference between our act of assembly, and the *stat. 2 G. 2. ch. 22.* But whatever difference does exist, is against the set-off, our act having regard to cases where a balance may be recovered by the defendant, and it cannot be said that partners may recover a debt separately due to one of them. But I throw this out only as my own opinion, and as we all agree that the debt due by *Stewart* to *Coulter* was a proper subject for equitable defalcation, I shall rest the opinion of the court on that ground alone.

It is undoubted, that chancery held jurisdiction of set-

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[1] The Reporter's notes of the arguments of counsel are omitted The opinion of Duncan, J., allowing the set off under an Act of Assembly is also omitted.

off before any statute on the subject was passed; and although a bill for an injunction would not now be sustained, where relief may be had at law, yet for the particular equity chancery will go beyond the terms of the statute, whose object seems to have been the convenience of suitors, in enabling the common law courts, in the generality of cases, to afford that relief which before was obtained only in chancery, without at all abridging the inherent powers of that court in cases not within the statute. It is remarked by Chancellor KENT, in *Dale* v. *Cook*, 4 Johns. Ch. 13, that the cases in which there has been a relaxation of the rule which forbids a set-off between joint and separate debts, are those of bankruptcy; and that it is said the chancellor's jurisdiction relative to set-off in bankruptcy, is derived from the *stat.* 13 *Eliz.* and 5 *Geo.* 2, and is wholly unconnected with the general statute of set-off, of *Geo.* 2. It is so. But I doubt whether this relaxation has arisen from any difference between the particular provisions of these statutes; and whether it would not be found to originate in the inherent power of the court, exercised in conformity to the provisions of the statute, only where the case presented no equity beyond the statute; but exercised where it did, not for the sake of convenience, but to prevent an absolute failure of justice, always taking care, however, that the interests of third persons be not jeoparded by the relief afforded in the particular instance. I do not say, however, that as a matter of course the several debt of one defendant can be set off against the joint debt of all, even in equity. In the case under consideration, one of the defendants proposes to pay the debt for which suit is brought, out of his own pocket, and there is therefore no reason to say the interest of his partner is involved, particularly as his partner is also a defendant and assents to it. Then, what is the particular equity on which this set-off is claimed? The suit against the defendants is brought for commissions earned after the date of the judgment, which is proposed to be de-

falked; and *Stewart,* in whose name it is brought, assigned his interest in it to the present plaintiff a month before obtaining a discharge, as an insolvent debtor, doubtless with the intention of eluding this claim on the part of *Coulter,* one of the defendants. The insolvency of *Stewart* alone, would furnish a sufficient equity for a chancellor, to prevent him from getting the fruits of his demand into his hands, without presenting to the defendants the means of coercing the payment of theirs. But this is not all. The demand of the plaintiffs arose from credit given chiefly, if not entirely, to the defendant, whose separate debt is set against it, and who was treated in the subsequent transactions of the parties, all but the bringing of this suit, as the debtor substantially liable; and, added to this, about the same time that *Stewart* obtained the benefit of the insolvent laws, *Coulter* settled with *Day,* his partner and co-defendant, paid him, and took the responsibility arising from this demand entirely on himself; so that the debt for which the defendants are sued, is effectively the debt of *Coulter,* and nothing is in the way of the set-off but the name of *Day,* as a party of record. The difficulty, then, is only one of form,—*Stewart* and *Coulter* alone, standing substantially in the relation of debtor and creditor. Would there not then be an absolute failure of justice, in permitting assignees who stand in no better equity than their assignor to recover against partners, one of whom would, in consequence, be left to the desperate chance of obtaining satisfaction for his separate demand from the assignor, who is absolutely insolvent? It seems to me, this would furnish a claim to relief on grounds of general equity, which no chancellor could withstand. In such a case even a court of common law would give relief, on the foot of its common law jurisdiction of setting off one judgment against another. *Roberts* v. *Biggs,* Bull. N. P. 336. *Mitchell* v. *Oldfield,* 4 Term Rep. 123. The only thing that has weighed with me, is a doubt whether that course ought not to have been pursued here. But in

delivering the opinion of the court in *Waln* v. *Hewes,* 5 Serg. & Rawle, 470, I am convinced that I erred, in supposing that relief could in *no* case be had, but after judgment. This court possesses not only its common law jurisdiction over the subject, but, in virtue of its chancery powers, the jurisdiction of a court of equity, and may therefore afford more extensive relief than what can be had at the common law; and there is beside a peculiar fitness and convenience, in going into the inquiry at the trial, as there may be a variety of facts such as the insolvency of the plaintiff, which are proper for the decision of the jury. On general grounds, however, I am clear that the set-off was properly allowed, and the rule for a new trial must therefore be discharged.

Rule discharged.[2]

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[2] *Accord: Lewis* v. *Culbertson,* 11 S. & R. 48, 1824. (A and B were partners. A and B were indebted to C. C was indebted to A. B died. C sued A on a partnership debt. *Held,* that A could set off the debt due him by C.)

Compare: Watts v. *Christie,* 11 Beav. 546, 1849. (A and B were partners. A as an individual, and the firm had accounts at a bank. The account of A had a credit; the account of the firm was overdrawn. The bank stopped payment. A assigned his credit to the firm. The bank refused to transfer the account of A to the credit of the firm. The bank went into bankruptcy, and the assignees sued the firm. The firm brought a bill in equity to allow them to set off, against the claim of the bank, A's claim against the bank. Refused.)

TUSTIN *v.* CAMERON.

In the Supreme Court of Pennsylvania, 1839.

5 *Wharton's Reports*, 379.

Error to the District Court for the City and County of Philadelphia.

In the Court below John Cameron brought an action on the case against Thomas Tustin and George W. Harris, lately trading under the firm of Tustin & Harris, upon two promissory notes, dated the 2d of October, 1838, for five hundred and fifty-three dollars each, drawn by the defendants in favour of the plaintiff; one payable in thirty days, and the other in sixty days after date.

The defendants filed the following affidavit of defence.

"George W. Harris, one of the defendants above named, being duly sworn, says:—The above named defendants have a just and legal defence to the whole of the plaintiff's claim in this case, the nature and character of which defence are as hereinafter set forth. Prior to and on the 4th day of November, A. D. 1838, the plaintiff was, and has ever since continued to be, and still is indebted, to a firm styled the Western Transportation Company, (consisting of the above named defendants and David Leech, Thomas S. Clark, William Little, Thomas Leuford, James Arthur, and Robert S. Hays,) in the sum of two thousand dollars and upwards, for money had and received by the said plaintiff, before the said 4th day of November, A. D. 1838, as the agent of and for the use of the said Western Transportation Company; by all the members of which the defendants are expressly authorised and requested and do therefore claim to set off against the plaintiff's claim in this suit, so much of his said debt to the said Western Transportation Company as may be necessary to extinguish the plaintiff's said claim."

A rule to show cause why judgment should not be

entered for want of a sufficient affidavit of defence, was granted by the Court, and after argument the rule was made absolute. Whereupon the defendants took this writ of error.

Per Curiam.—This case has every feature of *Wrenshall* v. *Cook,* except the plaintiff's insolvency. Such a feature, however, is not an essential one; though, existing in that case, it was stated as a circumstance to make the expediency of a set-off more apparent. It is the practicability of avoiding circuity and needless costs with safety and convenience to all parties, which determines the question of set-off: and an increasing liberality has greatly, but cautiously and beneficially enlarged the doctrine within a few years past. Thus in *Childerston* v. *Hammond.* (9 Serg. & Rawle, 68,) and *Stewart* v. *Coulter,* (12 Serg. & Rawle, 252,) a defendant jointly sued, was allowed to set off the plaintiff's debt separately due to himself; a superior equity in a third person not being in the way. Is not that the converse of our case, in which a defendant separately sued proposes to set off a partnership debt with the assent of his partners? In *Henderson* v. *Lewis,* (9 Serg. & Rawle, 379,) a debt due to the plaintiff by a co-obligor sued but not summoned, was not allowed to be set off with the co-obligor's assent, only because he was effectively a stranger to the action; and a third person is never suffered to make it a medium of recovery by cross action, without risk of costs. That is very different from a recovery of the defendant's own demand with the license of those who have a concurrent interest in it. Such is a partnership cross demand; and it is ground of defence here.

Judgment reversed and a *procedendo* awarded.

SMITH *v.* PARKES.

In the High Court of Chancery, Before Sir John Romilly, Master of the Rolls, 1852.

16 *Beavan's Reports,* 115.

In 1845, a partnership which had previously existed between *Smith, Parkes* and *Brookfield* was dissolved, and by the deed of dissolution, dated the 7th of *April,* 1845, and subject to certain deductions therein mentioned, *Parkes* was entitled to receive from *Smith* and *Brookfield* 5,750*l.* for the good will, and 2,125*l.* for his share of the profits. *Witham* thereupon joined the partnership.

On the 30th of *April,* 1845, *Parkes* agreed to assign the interest which he took under this deed to the Defendants *Lucena* and others. Disputes afterwards arose between *Smith, Parkes* and *Brookfield,* and in *December,* 1845, bonds were given by *Smith* and *Brookfield* to secure the amount due to *Parkes,* and which he deposited in like manner for the benefit of *Lucena* and the persons interested under the former agreement of the 30th of *April.* Actions were subsequently brought in the name of *Parkes* on the bonds, but on the 23rd of *December,* 1846, an arrangement was come to between the continuing partners and *Parkes,* by a deed dated the 23rd of *December,* 1846, whereby *Smith, Brookfield* and *Witham* covenanted to pay the sums therein mentioned. This deed was given in substitution for the former deeds and bonds, *Lucena* and the others in the same interest accepted this deed of 1846 in lieu and substitution of the former securities, and the actions which had been previously bought by them in the name of *Parkes* on the bonds were discontinued.

Fresh difficulties afterwards arose under the deed of 1846, which were determined by arbitration.

In 1848, *Smith,* by the death of *Witham* and the in-

solvency of *Brookfield*, became the sole surviving member of the firm; and after he had made some payments under the deed of 1846, *Lucena* and the other assignees of *Parkes's* interest brought an action at law against him in the name of *Parkes*, to recover the amount remaining due under the deed of 1846; whereupon the Plaintiff, *Smith*, instituted this suit, alleging that at the date of the deed of 1846, *Parkes* was indebted to *Smith, Brookfield* and *Witham* in sums amounting altogether to about 2,318*l.* for money lent, and for a mortgage debt and business transacted, and he insisted on his right to set off these sums against the amount due on the covenant contained in the deed of 1846.

Pending the suit *Parkes* obtained judgment in the action.[1]

The MASTER *of the* ROLLS, at the close of the argument, expressed his opinion on the principal points in the case, and stated, that he was of opinion that the plaintiff (the sole surviving member of the partnership of *Smith, Witham* and *Brookfield*) was entitled, in equity, to set off against the debt established against him at law by the Defendant *Parkes*, such sum as *Parkes* owed to the firm of *Smith, Witham* and *Brookfield*. He also stated his opinion, that the other Defendants to whom *Parkes* had assigned his interest in and his claim against the firm, under the deed of dissolution, were also bound to allow such set-off, to the extent of all debts due to the firm from *Parkes*, at the time the assignment was made to them; but he reserved his opinion on the question whether the Plaintiff was entitled to set off the debts incurred by *Parkes* subsequently to that period.[2]

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[1] The Reporter's Notes of the arguments of counsel are omitted.

[2] The Master of the Rolls subsequently held that the plaintiff was not so entitled, he having notice of the assignment.

For other cases involving questions of set off in partnership and individual demands, see 43 Cent. Dig., tit. Set Off, Secs. 82-99; Amer. Dig., tit. Set Off, Key numbers, 44 (2), and 45.

SECTION 2.—CORPORATION CASES.

SAWYER *v.* HOAG.

In the Supreme Court of the United States, 1873.

84 *United States Reports,* 610.

The Lumberman's Insurance Company was liable to Sawyer on a policy of insurance. The assignee in bankruptcy of the Company, Hoag, was proceeding against Sawyer on the obligation described in the opinion of the Court. This was a bill in equity brought by Sawyer *v.* Hoag to enforce a right of set off. The court below decreed against the complainant. [1]

Mr. Justice Miller: The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of $100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, $5000. He took the check of the company for $4250, being the amount of his subscription less the 15 per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at 7 per cent. per annum. The appellant and the company,

[1] The rest of the facts are stated in the opinion of the Court. The facts as stated by the Reporter, and his notes of the arguments of counsel are omitted.

by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than 7 per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt. * * *[2]

The result of it [The transaction between Sawyer and the company by which the company was said to re-loan 85 per cent. of the stock subscribed] was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred instalments properly secured.

It is said by the appellant's counsel that conceding this, it is still a debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under the twentieth section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided,* that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."[3]

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[2] The Court's discussion of the transaction between the company and its stockholders is omitted.

[3] The wording of Sec. 68a of the Act of 1898, is as follows:

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by

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"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.

These principles require the affirmation of the decree in the present case, and it is accordingly affirmed.[4]

For other cases in accord: See Thompson on Corporations, edition of 1910, Sec. 5854, notes.

Compare: Lawrence v. *Nelson,* 21 N. Y. 158, 1860. (The A Co. was a mutual insurance company, having no dealings with regard to insurance with any but its own members. B was a member of the company. On its insolvency B attempted to set off a loss sustained by him, adjusted and payable by the company against his indebtedness for premiums due upon policies. *Held,* that B could not do this, as the premiums constituted a fund from which losses were paid, which he as a member was bound to make good.)

Welles v. *Stout,* 38 Fed. 807, 1889. (The A bank was required by the Controller to make good the value of certain securities, which had become worthless. B, a stockholder contributed to a fund held by the Bank in trust to carry out the directions of the Controller. Part of this fund had been expended by the Bank before a receiver was appointed. The Receiver treated the balance as part of the ordinary assets of the Bank, and sued B for an assessment on his shares. *Held,* that B could set off his interest in the balance of the fund.)

MATHEZ *v.* NEIDIG.

IN THE COURT OF APPEALS OF NEW YORK, 1878.

72 New York Reports, 100[1]

CHURCH, Ch. J. The plaintiff, as a creditor of "The New York Improved Barrel Company," sought to recover against the defendant, as a stockholder of the company, under the provisions of section 10 of the General Manufacturing Law (chap. 40, Laws of 1848), which reads as follows: "All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in." * * *

It was established and not disputed that the amount of the capital stock had not all been paid in; and although there was some dispute whether the defendant owned $2,000, $3,000 or $5,000 of the stock, that question was submitted to the jury, and is of no importance upon this appeal.

The defendant was president of the company for about three months, during which time he advanced $1,500, and purchased three notes against the company amounting to $3,000, which he surrendered to the company, and he also advanced about $2,500 from his own means, with which he paid the workmen.

The court held, in substance, that if the amount of stock owned by the defendant did not exceed these advances, the plaintiff could not recover. The learned counsel for the appellant presented, and elaborately argued, several

[1] The Reporter's notes of the arguments of counsel are omitted

propositions which, if correct, would require a reversal of the judgment. His principal contention is, "that only those payments which by law could be enforced against a stockholder, may be voluntarily paid by him, and offset against a creditor." This proposition implies, I think, some misapprehension as to the nature and character of the defense interposed in this action, and the nature and extent of the remedy of creditors under the statute cited. A stockholder may be absolutely discharged from all liability under this statute, by payment, on legal compulsion, to any creditor or creditors for whose debts he is liable, if such payment equals the amount of his stock. His liability is measured by the amount of stock held by him. To entitle a stockholder to interpose such discharge as an absolute bar to a claim by other creditors, either at law or in equity, it would, I think, be incumbent upon him to show that the payment was made to a creditor or creditors for whose debts he was liable under the statute. He is only liable to pay the amount once; but the payment must be made in discharge of a statute liability. Probably the same effect would result from a voluntary payment. The defense in this case rests upon a very different principle. The defendant was a creditor of the company for money advanced, and it matters not whether the money was used to discharge obligations for which the defendant was individually liable, under the statute, or not. The company was bound to pay all its debts, and could borrow money for that purpose. The money was used for the benefit of the company, and it became liable to the defendant, and he became its creditor for the amount. I agree with the counsel for the appellant, that the statute liability constitutes a fund which belongs to the creditors to secure the payment of their debts, but it belongs to all the creditors, as well as those who are stockholders as those who are not. The defendant, as a creditor, had an interest in the fund as well as the plaintiff, and his debt was one which would be chargeable against the

fund, because it was a debt against the company, for the payment of which stockholders were individually liable, and this would be so irrespective of the question whether the money advanced by the defendant was used to pay obligations for which he was individually liable or not. An action at law cannot be maintained against a stockholder, who is also a creditor to an amount equal to his stock, for the reason that he has an interest in the fund sued for, and it cannot be known but that the whole fund is sufficient to pay all the debts. No accounting can be had, because the proper parties are not before the court. If the liability of other stockholders was sufficient to pay all the debts, his own liability would be balanced by his debt against the company. A stockholder owning $1,000 of stock with a debt against the company of $5,000, sued by a creditor for $1,000, would himself be entitled to five-sixths of the $1,000, if there were no other stockholders personally liable and no other debts; and if there were other personal liabilities to the amount of $5,000, and no other debts, he would be entitled to $5,000 of the $6,000 constituting the fund. Hence it would be inequitable to permit a recovery against a stockholder thus situated. The creditor has his election to bring such an action against a stockholder, or to bring an action in equity, and have an accounting between all the stockholders and all the creditors, when the rights of each can be ascertained and protected. (*Bk. of Poughkeepsie* v. *Ibbotson*, 24 Wend., 73; *Briggs* v. *Pennington*, 8 Cow., 392.)

The defense interposed in this and analogous cases may not constitute an absolute bar to all claim like a recovery and payment by another creditor for the whole amount of personal liability of a stockholder, nor is it strictly an offset at law, but it is a defense to this form of action, in the nature of an equitable offset, based upon the equitable rights of the defendant to the fund sought to be taken from his possession, without the necessary facts appearing to enable the court to determine the extent of those rights.

This question is not a new one in this court. In *Garrison* v. *Howe* (17 N. Y., 458), where substantially the same question was involved, DENIO, J., said: "Suppose a stockholder to be a creditor to just the amount of his stock; he ought not to be required to pay anything, unless the sum of the corporate debts is larger than the aggregate of all the liabilities of the stockholders. But he cannot, in this class of actions, have an account, because the proper parties are not before the court. He must, therefore, upon the doctrine of the plaintiff in this suit, pay the debt sued for, though in equity he is not liable for anything;" and he stated the rule to be: "If the creditor cannot find a responsible stockholder, who is not at the same time a creditor to the amount of his stock, he must proceed for an account, if he ascertains that such a proceeding will result in recovering his debt."

A defendant in such an action may also, doubtless, bring an action for an accounting, or he may be content with interposing a defense, in whole or in part, to the plaintiff's action at law.

In the matter of *Empire City Bank* (18 N. Y., 227), the doctrine is reiterated. The court say: "In such a case no account could be taken, and it would not regularly appear but that the plaintiff's debt was the only one in existence against the corporation; nor could it be shown but that there were other stockholders who were not creditors, whose liabilities were sufficient to satisfy the plaintiff's debt. In such a case the plaintiff ought to be exonerated to the extent of his own debt." I am not aware of any authority in conflict with these decisions, and we have been referred to none.

The rule commends itself to my judgment. Stockholders have the same right to deal with the corporation that other persons have, and, as creditors, they are entitled to the same measure of protection. It may be, as argued, that the rule might enable officers of corporations to make

preferential payments to favored creditors, and thus work injustice to others; but, if any restrictions or limitations in this respect are necessary, the remedy is with the Legislature. Nothing appears in this case to warrant an inference of bad faith on the part of the defendant. The facts disclosed justify the inference that the money was advanced to the company to relieve it from pressing liability, and enable it to prosecute its business. I see no reason why the defendant, as a creditor, does not occupy as favorable a position as the plaintiff, and there is no justice in permitting the latter to recover money to which the former has an equal claim, in an action where it cannot regularly be ascertained, but that other portions of the aggregate fund, which are accessible to the plaintiff, are sufficient to satisfy his demand.[2]

Judgment affirmed.[3]

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[2] The Court's discussion of another section of the Act is omitted.

[3] *For other cases allowing the set off when the proceeding is to enforce a statutory liability of the stockholders.* See Thompson on Corporations, edition of 1910, Sec. 5855, notes.

Query: Does the "hopeless conflict in the decisions on the question of the right of a stockholder to set off" referred to *ibid.*, Sec. 5854, 5855 really exist?

GALLAGHER *v.* GERMANIA BREWING CO.

IN THE SUPREME COURT OF MINNESOTA, 1893.

53 *Minnesota*, 214.[1]

MITCHELL, J. The plaintiff, as assignee of one Westphal under a general assignment for the benefit of creditors, brought this action to recover for goods sold and delivered by his assignor to the defendant corporation. Jacob Barge and John Vander Horck intervened, and set up in their complaint that they owned, and for nearly two years had owned (each one-half,) all the capital stock of the defendant, no other person but themselves having any interest in the stock or property of the corporation; that each of them had a valid and unsatisfied judgment against Westphal upon a cause of action which accrued before the assignment to plaintiff; that Westphal was, and for over two years had been, utterly insolvent; and that his estate, of which plaintiff is the assignee, was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corporation. From an order overruling a demurrer to the complaint, the plaintiff appeals, his contention being—First, that Barge and Vander Horck had no such interest in the litigation as to entitle them to intervene; second, that their claims cannot be set off against a claim against the corporation, because a corporation is a legal entity, entirely distinct from its stockholders. These two propositions amount really to the same thing, for, if Barge and Vander Horck cannot set off their claims against that of plaintiff against the corporation, they have no such interest in the subject of litigation as would

[1] The Reporter's statement of the facts of the case, and his notes of the arguments of counsel are omitted.

entitle them to intervene; on the other hand, if their claims are proper equitable set-offs, their right to intervene for the purpose of setting them up is very clear. This case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. Of course, the want of a precedent is by no means controlling with courts, especially in administering equitable relief; but it would seem that, if the relief here asked was consistent with legal or equitable principles, some case would be found where it had been granted.

The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at the same time indebted to them on claims of greater amount, which they will wholly lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law.

The right of equitable set-off is, of course, not derived from, or dependent upon, statute, but rests upon a distinctly equitable doctrine, which courts of equity have applied on certain well-recognized equitable grounds, the object being to effect a clear equity and prevent irremediable injustice: and it may be stated as a general rule that, whenever necessary to accomplish that end, the courts will permit an equitable set-off, although the debts accrued in different rights; as, for example, by allowing a separate debt to be set off against a joint debt, or, conversely, a joint debt against a separate debt. They will also disregard the nominal parties to the record, and consider the real parties in interest; as, for example, when the assignor of a chose in action sues for the benefit of the assignee, or a trustee for the benefit

of the *cestui que trust*. Hence, had the plaintiff's claim been a joint one against the interveners, there would have been no doubt of their right to set off their separate claims against it, for insolvency is well recognized as a distinct equitable ground for allowing such a set-off. But such a case is not analogous to the present. To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest. In dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat a corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved, and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall.

Inasmuch as the two interveners own all the stock of this corporation, the facts of this case seem comparatively free from embarrassments, and the contention of respond-

ent quite plausible. But, suppose there were fifty other stockholders, (which would not alter the principle,) what would be the result? Could interveners then interpose their claims at set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?

Again, the right of set-off, if any exists, must be mutual. Hence, if stockholders can interpose their individual demands as set-offs to a demand against the corporation, it follows that a defendant can set up demands against the individual stockholders at set-offs to demands in favor of the corporation.

Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders.

What means, if any, the interveners might have had, or may hereafter have, of protecting themselves, it is not now our business to inquire, but we are clear that their claims against plaintiff's assignor are not the subjects of equitable set-off to a claim against the defendant corporation.

Order reversed.[2]

Compare: New York Ice Co. v. *Parker,* 21 How., Pr., 302, 1861. (The A Co. brought a suit against B. *Held,* that B could not set off a claim which he, B, had against some [or all?] of the stockholders of the A Co. jointly.)

CHAPTER XV.

LIABILITY OF ORIGINAL SHAREHOLDERS IN PRIVATE CORPORATIONS.

SECTION 1.—LIABILITY IN GENERAL.

THE CASE OF THE TWO LOMBARDS.[1]

In The Court of Common Pleas, 1441-2.

Year Book 19 Henry VI, Folio 80, Placitum.

Markham came to the bar and showed how one brought a writ against the Lombards, of London, *scilicit, Praecipe Societati Lumbardorum Lond. Mercatorum d'Florencia,* And two Lombards came—and he named their names, who were at the bar in their own persons, being distrained by the sheriff of London, and the issues[2] returnable here at ten pounds. And Sir, you have here these same, etc., who appeared in their own persons as Lombards to record their presence. Newton [Chief Justice] demanded the plaintiff, and he appeared, and afterwards he demanded the defendant, and the crier demanded them in this form: The fellowship of Lombards, according to the writ. And the two Lombards appeared as before. Newton: that is no appearance, for the writ which we have returned here is, the fellowship of Lombards, and you say that you are not of the fellowship, and if so, then the sheriff has done wrong to you when he distrained you by his writ; in which case your remedy lies against him, and not in this place in this way. Brown: If a writ be brought against me by the name of John

[1] Translated by M. C. K.

[2] Issues: Profits growing from amerciaments or fines. See Terms of the Law, p. 416.

Brown, and the sheriff distrains me, whereas my name is Thomas, when the issues are returned here, I may well say that my name is Thomas, and that I was distrained by the name of John, and pray that the Court record my appearance and save my issues. And this was denied to him by the Court, but that his issues are lost and that he shall have his recovery against the sheriff. Brown: Suppose that a *praecipe quod reddat* was brought against J. B., who is summoned in my land, and the summons returned; I may well say that I am named Thomas Brown, and although I was summoned by the name of John Brown in my land, by default, there is no default in me: so I shall plead as before to save my issues, otherwise I shall lose them, and no default is in me. And the justices paid attention to something else which was at the bar, and gave him no reply. Markham: it appears to you that the writ cannot be good in this form—*Societati;* wherefore we pray your rule. Paston, [Judge], if a writ be—*Praecipe Majori and Societati Civitaties Lond.* If all the commonalty appear, and the Mayor does not, they cannot plead in abatement of the writ that there is no such corporation; *Ergo nec hic.* Markham, Sir, then we will consider until to-morrow.[3]

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[3] Sir Robert Brooke, in "La Graunde Abridgement Tille Trespass," pl. 135, has the following note of this case: "Debt. At the distress the sheriff distrained J. B. where the name of the defendant in the writ was T. B. There J. B. shall have his remedy against the sheriff, and *hoc videtur* by a general action of trespass, but where he serves the writ rightly, and it is imperfect, or he makes a false return, *videtur* that action upon the case lies, also on the other hand of an actual tort, as above. And the principal case was that debt was brought against, *societatem Lumbardorum mercatorum de Floranc.*, and the sheriff distrained two Lumbards, who came in person and prayed their appearance should be recorded to save their issues as distinct persons *sed non de sociatateate, Lumbardorum,* and *idee non allocatur,* but that they should be put to their remedy against the sheriff of London, *ut supra,* for where a corporation is impleaded they should not distrain any private person. *Quod nota.*" Brooke's Abridgement Trespass, p. 290. pl. 135. *Query:* May we conclude from the case that had the two Lombards been of the fellowship the Judges would have still considered that the sheriff would not have been justified in distraining on them?

Viner apparently had his information of the case from Brooke. See Viner's Abridgement, Vol. 6, p. 310. "Debt was brought *against the Society of Lumbard Merchants* of Florence, and the *sheriff distrained 2 Lumbards, who came in person,* and prayed their appearance to be recorded to save their issues *as distinct persons, but not as of the*

Society of Lumbards & ideo non allocatur, but that they shall be put to their remedy against the Sheriff of London, by a general action of trespass; *for where a corporation is impleaded, they ought not to distrain any private person; quod nota.* Br. Trespass, pl. 135 cites 19 H. 6 80."

Professor Williston in his article on "The History of the Law of Business Corporations before 1800," Select Essays on Anglo-American Legal History, Vol. 3, p, 229, follows Viner, going indeed so far as to say that it "seems to have been well understood," that the debt of a corporation was not a debt of the individual members. "For instance, in Y. B., 19 Hy. VI 80, it was held that an action of debt being brought against the Society of Lombards, and the sheriff having distrained two individual Lombadrs, trespass would lie against hm. For where a corporation is impleaded they ought not to distrain any private person.'"

EDMUNDS *v.* BROWN.

In the Court of King's Bench, 1669.

1 *Levinz's Reports*, 237.

Debt of an obligation of 500*l.* The Defendant pleads *Non est factum,* and on the Evidence it appears. That the Defendants were two of the Principal of the Company of Woodmongers lately dissolved; and that the Money was borrowed in the Name of the Company, and the Obligation sealed in the Company's Name, and with their Seal; and the Defendants, as was usual, set their Names to the Obligation, but the Obligation was, *Noverint universi per praesentes nos Magistrum & Guardianos, &c. del Company de Woodmongers teneri, &c.* And the Obligation was endorsed with *sigillat' & deliberat' in praesentia, &c.* and attested. And now the Company being dissolved, the Plaintiff brought the Action against the Defendants, intending to charge them in their own Right. But it was ruled by the Chief justice at *Nisi prius* at *Guild-hall,* that he could not so do, it being *ut supra;* whereupon the Plaintiff was nonsuit.

SALMON *v.* THE HAMBOROUGH COMPANY.

IN THE HOUSE OF LORDS AND THE HIGH COURT OF CHANCERY, 1672.

Cases in Chancery, 204.

Doctor Salmon against the Hamborough Company, by the name of the Governor, Assistants and Fellowship of Merchant Adventurers of England, and divers particular members of that Company by name, in their natural capatities.

The bill charged, that the company were incorporated *prout* per letters patent, and had power to make by-laws and to assess rates upon cloaths (which was the commodity they dealt in) and by poll upon every member to defray the necessary charge of the company, and that the company had imposed rates accordingly, as namely, 4s. 6d. upon every white cloath exported, and divers others, and thereby raised 8000*l.* per Annum towards the support of the common charge of the company, and that they had thereby got great credit, and borrowed great sums of money by their common seal, and particularly the plaintiff lent 2000*l.* upon that security many years since. And the bill did set forth divers advantages they had in trade by being members of this corporation, which others wanted. And the bill did charge, that the company having no common stock, the plaintiff had no remedy at law for his debt, but did charge that their usage had been to make taxes, and levy actions upon the members and their goods, to bear the charge of their company to pay their debts, and did complain that they now did refuse to execute that power, and did particularly complain against divers of the members by name, that they did refuse to meet and lay taxes, and that they did pretend want of power by their charter to lay such taxes, whereas they had formerly exercised power, and thereby gained credit; whereupon the plaintiff lent them 2000*l.*

which was for the use and support of the company's charge, and so ought to be made good by them, and so prayed to be relieved.

Paschae, 1656, this bill was filed, and the company served with process, but would not appear, they having nothing by which they may be distrained: But divers particular members being served in their natural capacities, did appear and demur, for that they were not in that capacity liable to the plaintiff's demands. 10, May, 1666. On the argument the demurrer was allowed, and the bill dismist as to them, and that dismission enrolled, and thereupon a petition of appeal was preferred to the Lords in Parliament, admitting that in the ordinary course of proceedings in Chancery that Court could not help the plaintiff. But in causes of this nature the Lords house had given special directions to the Chancery to relieve, and it had been accordingly so done, and produced two precedents against companies in London for that purpose. And to this petition the defendants particularly named did put in an answer. Plea and demurrer, and the company, tho' several times summoned, did not appear. And upon debate of the matters before the Lords at the Bar of the Lords house, 20 January, 1670, this order was made.

The matter upon the petition of Salmon, Dr. of Physick, exhibited to the Lords spiritual and temporal in Parliament assembled, against the Governors, assistants and fellowship of the merchant adventurers of England, commonly called the Hamburg Company, and Sir Charles Lloyd, Baronet, Sir Anthony Bateman Knight, Thomas Smith, Richard Wyon, John Dogget, Henry Colliar, Henry Smith, John Lethieulier, Christopher Pack, George Wytham, and others, members of the said company, and upon the answer, plea and demurrer of the said Rowland Wyan, John Dogget, Henry Collier and John Lethieulier put in to the said petition (the Governor, Assistants and Fellowships, tho' several times summoned, not appearing) being heard at the Bar of this house, in presence of counsel

learned on both sides, the said petition being on appeal made from a dismission in the high Court of Chancery, and the petitioners bill there. Their Lordships on reading the said petition, the answer, plea and demurrer thereto, and the said dismission and the charter by which the said Governor and Fellowship are incorporated, and hearing what was alleged on both sides, do order that the dismission, for so much as concerns the said company, be, and do stand reversed, and that the Lord Chancellor, or the Lord Keeper of the Great Seal of England for the time being, do retain the said bill. And that the said Court of Chancery shall issue forth the usual process of that Court, and if cause be, process of *distringas* thereupon against the said corporation; provided the said process be served one month before the return thereof. And if upon the return of the process, the said corporation shall not file an appearance, or shall appear and not answer, the said bill shall be taken *pro confesso*, and a decree shall thereupon pass. But in case the said corporation shall appear and answer within the time aforesaid, then the Court of Chancery shall proceed to examine what the plaintiff's just debt is, and shall decree the said company to pay so much money as the same shall appear to amount unto, with reasonable damages. And in case the corporation shall not pay the sum decreed within ninety days after the service of the said decree upon their Governor, Deputy Governor, Treasurer, Clerk or Secretary for the Time being; then the lords Spiritual and Temporal do further order, adjudge and direct, that the Lord Chancellor or Lord Keeper for the time being shall order and decree, that the Governor or Deputy-Governor and the twenty-four assistants of the said company, or so many of them as by the tenor of their charter so constitute a quorum for the making of leviations upon the trade, or members of the said company, for the use of the said company, shall within such time as by the Lord Chancellor or Keeper shall be thought fit, make such a leviation upon every member of the said company as is to be contributary to the publick charge, as shall be sufficient to satisfy the said sum to be decreed to

the plaintiff in that cause, and to collect and levy the same, and to pay it over to the plaintiff as the Court shall direct. And such a leviation is to be put in writing, and signed with the hand of the Governor, Deputy-Governor and Assistants of the aforesaid company for the time being, and so many of them, as by the Constitution of the said charter do make a quorum, shall not make or return such leviations, as aforesaid, the Lord Chancellor or Lord Keeper may issue process of contempt against them, as is usual against persons in their natural capacities. And if by the said time so to be limited by the said Court of Chancery, the said money so to be assessed, shall not be paid, then and from thenceforth every person of the said company, upon such a leviation, shall be made to be liable in his capacity to pay his quota or proportion assessed. And the Lord Chancellor or Lord Keeper is to order or decree, that such process shall issue against any such member so refusing or delaying to pay his quota or proportion, as is usual against persons charged by the decree of the said Court, for any duty in their federal capacities. And if the total so returned and filed with the register shall not amount to so much as shall be sufficient to satisfy the sum decreed, with respect had to such person as shall make it appear that they are overcharged, or ought not to be charged at all, then the said Lord Chancellor or Lord Keeper for the time being, may from time to time, order that a new leviation be made and returned into the registers of the Court of Chancery, of such sum as shall be sufficient, by way of supplement for that purpose, to the payment whereof every individual person is to be bound in such manner as aforesaid.

6 March 1670. The Lord Keeper on a motion grounded on the Lords, ordered that the dismission stand reversed, and the bill stand revived, and that process and other proceedings issue as is thereby directed, and the service thereby directed be sufficient.

Accordingly the Treasurer and Secretary were served with a *distringas* against the company, and copies of the

Lords Order. The sheriff returned *nulla bona;* and no appearance is made.

5 July 1671. Ordered the cause be put into the paper to be heard, and notice to be given to the Treasurer, Clerks and Secretary.

And now the 5th of July, 1671, none appearing for the defendants, the Court decreed the bill to be taken *pro confesso,* and the defendants to pay the plaintiff's debt, according to the Lord's order in Parliament.[1]

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[1] *Compare: Hume* v. *Wando Canal Co.,* 4 Amer. Law Mag. 92. (A bill was filed against the Members of a Company by a creditor; one defendant demurred on the ground that under the by-laws he was no longer a member of the Company. The bill charged that there never was any joint-stock capital, that the amount to be raised in order to pay the plaintiff for his work, was to be raised by progressive assessments on the stockholders. The defendant demurring was a member of the Company at the time the contract was formed. Desaussure, C., *held,* that the defendant was liable to pay his proportion of the debt. The decision is based on our principal case. The opinion is an interesting one, the learned Chancellor taking the position that at common law the members of a corporation are liable for its debts. *Query:* Whether he would have regarded stockholders as liable beyond the amount of stock subscribed when there was definite capital stock? For an interesting discussion of this case and our principal case see the Article in 1 Amer. Law Mag. 96, and the Article in reply, 4 Amer. Law Mag. 363.)

Two questions may be said to be doubtful in regard to Salmon v. *Hamborough.*

First, did the "leviation" directed ever take place? or did the Doctor, wearied out by his sixteen years of proceedings in chancery, discontinue the proceedings?

Professor Williston thinks that at least the "leviation" directed actually took place. The evidence of this is a note by the Reporter, Vernon, to *Harvey* v. *East India Co.,* 2 Vern. 395, 1700, p. 396, Edition 1729: "In the case between Dr. Salmon and the Hamborough Company, the members in their private persons were made liable, the Company having no goods." Mr. Williston, Hist. of the Law of Business Corporations, Select Essays in Anglo-American Legal History, Vol. III, p. 230. It may be doubted, however, whether the Reporter was doing more than referring to the principle of law enunciated in Doctor Salmon's case, which was decided some nine years before the earliest case we have from Vernon's manuscript, and a few months before the future Reporter, at the age of eighteen, registered as a student in Lincoln's Inn. It is not unlikely, therefore, that the only information Vernon had of Doctor Salmon and his bill was "Cases in Chancery," the first edition of which appeared in 1697, or three years before the case of *Harvey* v. *East India Company,* and that this note is nothing more than a syllabus of the principle decided.

Second: It is not certain whether the Hamborough Company was incorporated.

Fomblanque says: "If it was, the law of the decision seems very doubtful." Fomblanque's Equity, Vol. I, Edition of 1795, p. 207, note (p). Viner arranges the case under the title "Process against Corporations", 6 Viner, 310; but there is nothing in his report of the case to show that he used any source of information besides the report in Cases in Chancery which we have reprinted.

CARR *v.* IGLEHART.

In the Supreme Court of Ohio, 1854.

3 *Ohio State Reports*, 457.

Per Curiam. This is a bill in chancery to collect the amount due upon three bank bills, issued by the Lebanon Miami Banking Company, for the payment, in the aggregate, of the sum of five dollars. It is founded upon the idea that the defendants, who were stockholders in the bank when the bills were issued, are individually liable for its debts, This liability is not deduced from any independent contract by which they undertook to pay the debts, for no such contract is alleged. Nor does it rest upon the ground that they have received the assets of the corporation which were bound for its liabilities, for no such fact is stated. Nor is it pretended that there is, in the charter of the bank, any provision that, either expressly or by necessary implication, makes it stockholders personally responsible. It is upon neither of these grounds that relief is sought. The ground upon which we are asked to sustain the bill is, that stockholders in a corporation are individually liable for its debts, unless, by some provision of the charter or statute law, they are exempted from such responsibility. The counsel for the complainant admits that Blackstone, and divers other eminent writers upon the law, and also certain courts, have entertained a contrary opinion; but he is very clear they were all wrong, and he hopes and thinks this court will not be governed by such loose and inconsiderate expressions, either of text writers or judges.

After a careful consideration of the elaborate and learned argument of counsel, we are unable to perceive that he has established the liability of the defendants. We sup-

pose that no law is better settled than that they are not liable.[1]

Demurrer sustained and bill dismissed.[2]

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[1] That part of the opinion in which the Court points out that the subject of the suit is too trivial for the cognizance of a court of equity is omitted.

[2] *Compare: In re The Sheffield and South Yorkshire Permanent Building Society,* L. R. 22, Q. B. D. 470, 1889. (A, *et al.,* were some of the members of a corporation. A statute provided that each shareholder should be liable for the amount unpaid on his share, and also provided that the rules of the Company shall provide a method by which a shareholder may withdraw. A, *et al.,* not having paid for their shares in full, withdrew, following the rules prescribed by the Company. Within a year the Company went into liquidation. In the liquidation proceedings, *held,* that A, *et al.,* were not liable for the unpaid amounts on their shares. Cave, J.: "If he [A] had remained a member, and had not paid them, he would have been 'in arrear,' and be liable to pay a fine. But, under the circumstances of the case, he is not liable at all. That disposes of the case so far as the county court judge decided it. But Mr. Grosvenor Woods took a different point, with which it is necessary for us to deal. He argued that persons who unite together for trading or making profits in any way are, at common law, liable for all debts which are incurred during the time they are members of the association, and that, if the association has ultimately to be wound up, past members must pay their shares of the debts. As a general rule—apart from legislation—that is perfectly true with respect to partners, and with respect to associations in the nature of partnership where there is no incorporation, but with respect to corporations the case is entirely different where the legislature has not thought fit to intervene, or where the charter under which the body is incorporated does not provide otherwise. A corporation is a legal *persona* just as much as an individual; and, if a man trusts a corporation, he trusts that legal *persona,* and must look to its assets for payment; he can only call upon individual members to contribute in case the Act or charter has so provided.")

For other cases in accord; see Thompson on Corporations, Edition of 1910, §4725, notes.

UPTON *v.* TRIBILCOCK.

IN THE SUPREME COURT OF THE UNITED STATES, 1875.

91 *United States Reports*, 45.

Error to the Circuit Court of the United States for the District of Iowa.

Mr. Justice Hunt: The plaintiff, as assignee of the Great Western Insurance Company, a corporation organized under the statute of the State of Illinois, brought his action against the defendant, alleging that he was a stockholder of said corporation to the amount of ten thousand dollars; that twenty per cent. only had been paid upon his stock; alleging also the bankruptcy of the company, the appointment of the plaintiff as assignee, and the demand of the amount claimed, and seeking to recover the eight thousand dollars remaining unpaid. The complainant averred that the defendant did verbally agree to become such stockholder, and, with intent to become such, did accept a certificate for the same whereby he became bound to pay the full amount thereof, as follows: Five per cent. upon delivery of the certificates; five per cent. in three months; five per cent. in six months; five per cent. in nine months; and the residue whenever called for by the company, according to the charter of the company and the laws of the State of Illinois.

The defence is, that the subscription was obtained by the fraudulent representations of the agent of the company to the effect that the defendant would only be responsible for twenty per cent. of the subscription made by him; that afterwards he executed his promissory note for the twenty per cent., and secured the same by a mortgage of real estate; "and that thereupon (in the language of the answer), and pursuant to agreement, said subscription contract was surrendered and delivered up to defendant;" and also in the language of the answer, "that said note was a full payment and discharge of all obligations and personal liabilities of all

kinds whatsoever by reason of his contract so made and the relations created by the delivery to him of said certificate, and said note was received in full payment."

In his third amended answer, the defendant avers that he did subscribe for stock on the conditions mentioned; that after that contract was made, and before a certificate was delivered to him, and before executing his note, an agreement was made with Overton on behalf of the company to the effect before stated; and thereupon he made and delivered the note and mortgage which was received by Overton in full discharge and payment of the amount due on his said subscription.

The evidence contained in the bill of exceptions leaves the case substantially as is averred in the pleadings. The defendant offered evidence tending to prove representations that twenty per cent. only was required to be paid; that eighty per cent. was now assessable, and created no personal liability; that the agent, Overton, exhibited a blank form of certificate with the word "non-assessable" printed across the face, "being a copy similar to that subsequently filled up and delivered to defendant by Overton." It appears that, before the defendant made his subscription, a copy of the charter and by-laws had been furnished to him by Overton; and that, in returns made by the company to the Auditor of the State of Illinois of the amount of "unpaid subscribed capital for which the subscribers were liable," the amount of the defendant's note was included.

The case standing in this position upon the pleadings and the evidence, the plaintiff requested the court to charge the jury as follows:

2d. That any contract between the company or its agents and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the company, and as to the rights of the assignee who represents the creditors in this action.

3d. That if the jury find from the evidence that the defendant, J. D. Tribilcock, became a stockholder of the

Great Western Insurance Company in the month of August, 1870, and that he continued to own and hold said stock until after the insolvency of the company in February, 1873, that any representations by any agent of the company at the time defendant became such stockholder as to the matter of his liability for eighty per cent. of the stock, or any indorsement on the stock of the word "non-assessable," are wholly immaterial, and constitute no defence to this action.

This request was refused.

It is hardly necessary to argue the proposition, that if the defendant became a holder of shares of the capital of this insurance company to the amount of $10,000, and had paid but twenty per cent. thereof, its creditors were entitled to require of him the payment of the eighty per cent. remaining unpaid. The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. *Brigham* v. *Mead,* 10 Allen, 245; *Buff. City R. R. Co.* v. *Douglass,* 14 N. Y. 336; *Seymour* v. *Sturges,* 26 id. 134. The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefits of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion, that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away.

They are bound to call in what is unpaid, and carefully to husband it when received. *Sawyer* v. *Hoag,* 17 Wall. 610; *Tuckerman* v. *Brown,* 33 N. Y. 297; *Ogilvie* v. *Knox Ins. Co.,* 22 How. 380; *Osgood* v. *Laytin,* 3 Keys, 521; 37 How. Pr. 63, affg. 48 Barb. 463; Gross, Ill. Stat., p. 356, § 16.

We are of the opinion that the alleged representation of the non-assessability of the stock held by him was quite immaterial. It was so held in *Ogilvie* v. *Knox Ins. Co.,* 22 How. 380.[1]

Judgment reversed and new trial had.[2]

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[1] In the remainder of the opinion the Court holds (1) that the alleged misrepresentations relied on by the defense were as to the legal effect of the defendant's subscription, and that a misrepresentation or misunderstanding of law will not vitiate a contract; and (2), assuming that fraudulent misrepresentations were made which would have entitled him to have rescinded the contract, the question whether he had exercised due deligence in discovering the fraud and repudiating the subscription was not properly placed before the jury by the trial Court. On these two points Chief Justice Waite, and Justices Miller and Bradley dissented.

[2] *For further cases in accord,* see Thompson on Corporations, §3924, note 23.

The matter discussed in our principal case is often the subject of statutory regulation. For a typical statute and case arising under such statute, see

In re Remington Automobile and Motor Co., 153 Fed. 345, 1907. (Chap. 185, Laws of New Jersey, 1896, provided: "Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay the sum necessary to complete the amount of such share, as fixed by the charter of the corporation * * *" A Company issued stock to A at $25 per share of the par value of $100 as full paid and non-assessible. *Held,* that the statute quoted required, on the bankruptcy of the Company an assessment of $75 a share on A, if that sum was required to pay the debts of the Company "without discussing the question on general principles of corporation law." For other cases in accord, see Thompson on Corporations, Edition of 1910, §3905.)

On the question of what amounts to an estoppel, assuming that there has been sufficient fraud in obtaining the subscription to warrant the stockholder in cancelling it, see

Martin v. *South Salem Land Co.,* 94 Va. 28, 1896. (A subscribed to the stock of the B Co. The subscription was induced by fraud; but A took no steps to repudiate his contract until the B Co. was insolvent, and a creditor's bill had been brought against A and other stockholders of the B Co. *Held,* that A was liable for his unpaid subscription. Buchanan, *J.*: "A party who had been induced to subscribe for stock in a corporation by false or fraudulent representations as to a material fact upon which he had the right to rely, and did rely, is entitled to have the contract rescinded in the same manner as if the question had arisen between two natural persons, provided the question arises between *the contracting parties* and the rights of third persons are not involved. 1 Morawetz on Corp., sec.

108; 2 Thompson on Corp., sec. 1361; 1 Cook on Stocks & Stockholders, &c., secs. 151-161.

"A contract procured by fraud is not void, but voidable only, at the option of the party defrauded. It is binding upon him until rescinded, and, if before he exercises the option to rescind, innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be prejudiced by its rescission they may generally have it enforced for their benefit, although the party by whose fraud it was procured could not do so. *Oakes* v. *Turquand, &c.* (House of Lords), 2 Eng. & Irish Appeal Cases, L. R. 325; *Tennent* v. *City of Glasgow* (House of Lords), 4 Appeal Cases, L. R. 615; 2 Thompson on Corp., sec. 1363; 2 Morawetz on Corp., sec. 839.

"This principle is founded in reason and justice. If one of two innocent persons must suffer from the misconduct of a third, the burden must fall upon the one whose conduct enabled the third person to perpetrate the wrong complained of.") See further in accord cases cited in Thompson on Corporations, Edition of 1910, sec. 4924 notes, especially note 23; also, Amer. Digest. tit. Corporations, Key No. 80 (10).

On what amounts to a contract of subscription, see *Hawley* v. *Upton,* 102 U. S. 314, 1880: (A, by his bond, acknowledged the receipt from an insurance company of ten shares of its capital stock, and agreed to pay $200 therefor, in instalments,—one-fourth on the receipt of the stock certificate, and the remainder in three equal amounts at three, six, and nine months from January 7, 1871, the date of the bond. He paid on executing it $25, and his name was entered as a stockholder on the books of the company. The certificate was not delivered or demanded. In 1872, the company became bankrupt. *Held,* that the assignee was entitled to recover of A the unpaid instalments. Waite, C. J.: "It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made or the obligation in some lawful way extinguished"); Amer. Dig. tit. Corporations, Key Nos. 75-77.

On circumstances which will release a stockholder from his subscription, see Amer. Dig. tit. Corporations, Key No. 84; *also*

Potts v. *Wallace,* 146 U. S. 689, 1889. (The trustee for the benefit of creditors of a Company brought an action against W, a stockholder of record, to collect the amount of the stock subscribed by him. W, defended, on the ground that he had offered to pay the subscription when the Company was solvent, and the Company refused the tender. Shiras, *J.*: "It may be readily conceded that if the evidence in the case disclosed that the defendant's offer of payment and performance was refused by the company while solvent, and that the defendant availed himself of such refusal, and declared himself off from his contract of subscription, the defendant was thereby exonerated from the obligation of his subscription, and that his liability to pay would not be revived by the subsequent insolvency of the company and by the demands of the assignee." The Court being of opinion that the record showed that it was doubtful if W ever offered to pay his subscription, and in any event, did not show that on the refusal to accept payment, he repudiated his contract of subscription, refused to consider the defense good.)

LOUISIANA PAPER COMPANY *v.* WAPLES.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA, 1877.

3 *Woods' Reports*, 34.

Error to the district court.

The action was brought in the district court by the trustees in bankruptcy of the Louisiana paper manufacturing company, to recover of the defendant, who was a stockholder in the company, a balance alleged to be due and unpaid on his subscription of stock.

The company was established under a general law of this state (Rev. Stat., p. 183) which provided for the organization of corporations for works of public improvement, manufacturing and other purposes, by the adoption of a charter by the stockholders, and which directed that every charter should contain, among other things, the name of the corporation, its domicile, a description of the business which it proposed to carry on, a statement of the amount of the capital stock, the number of shares, the amount of each share, and the time when and the manner in which payment on stock subscribed should be made. The law also provided that the charter of corporations organized under it should be recorded in the office of the recorder of mortgages and published in a newspaper at the domicile of the corporation, once a week for at least thirty days. The statute also declared: "No stockholder shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him."

The third section of the charter of the Louisiana paper manufacturing company declared, "the capital stock of this corporation is hereby fixed at the sum of sixty thousand dollars, divided into six hundred shares of one hundred dollars each; twenty-five dollars on each share to be paid at

the time of the organization of this corporation, and five dollars on each share in thirty days, five dollars in sixty days, and five dollars in ninety days after said organization. The balance on each share, or any portion of such balance, shall not be called for, unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation.

The defendant subscribed twenty-five shares, and paid up the installment of twenty-five dollars and the three installments of five dollars each, mentioned in said third section, making a total of forty per cent. of the stock subscribed.

The suit was to enforce the payment of the remaining sixty per cent. of the stock for the benefit of the creditors of the corporation.

No meeting of the stockholders had ever been held to give their assent to the calling in of the unpaid sixty per cent. of the stock subscribed, nor had such assent been given.

The defense was that the sixty per cent. sued for was subscribed and to be paid only according to the terms of the charter, on condition that it should not be called in unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation, and that such assent had never been given.

The district court charged the jury that there was no liability of the defendant beyond the forty per cent. of his stock paid up, unless the remaining sixty per cent., or some part of it, had been called in by the assent of three-fourths of the stockholders, for the purpose of increasing the business of the corporation.

This charge is assigned for error.

Woods, Circuit Judge. This is not the case where there has been a subscription of stock, and the by-laws or other regulations adopted by the stockholders or directors prescribe how the subscriptions shall be called in, or the char-

ter itself declares in what installments the directors may call in the stock payments.

In such a case, there can be no doubt that the entire stock subscribed, whether called in by the directors or not, is a fund for the satisfaction of the debts of the corporation, and its payment can be enforced. Such regulations only pertain to the administration of the affairs of the corporation.

In this case, the charter, which was required to be recorded in a public office, and published in a newspaper at the domicile of the corporation, prescribed the installments by which forty per cent. of the stock subscribed should be paid, and then declared that the residue, or any portion thereof, should not be called for unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation.

The rule with regard to unpaid subscriptions of stock is this, that whatever sum is subscribed by the stockholders, and held out to the public as the stock of the corporation, is liable to be called in for the payment of its debts, even though the directors may refuse to make the call: *Purton* v. *N. O. & C. Railroad Co.*, 3 La. An., 19.

The power conferred upon directors to call in installments upon the shares, is a discretionary power; but that discretion is merely modal relating to the time and manner of making payments. When the wants of the company require those payments, it becomes the duty of the directors to cause them to be made, as much so as to require payment of debts due the company. It is not discretionary with the directors to say whether or not the debts of the company shall be paid when they have the power to compel payment: *Ward* v. *Griswoldville Man. Company*, 16 Conn., 601.

These doctrines are well established. Do they apply to the case in hand? It is to the charter of a corporation that reference is to be made to determine the rights of the public: *Stark* v. *Burke*, 9 La. An., 341.

Now, looking at the charter of the Louisiana paper manufacturing company, what was the contract which the

public was advised the stockholders had entered into with the corporation? Not to pay their subscriptions absolutely, nor to pay them when, in the discretion of the directors, it might be necessary for the wants of the company. No obligation was assumed to pay any more than forty per cent. of the stock subscribed, unless upon the vote of three-fourths of the stockholders, and then for a particular purpose. Clearly, as between the corporation and the stockholders, the unpaid stock above forty per cent. could not be called in except on the terms prescribed by the charter. The public, the creditors of the corporation, are in no stronger position than the corporation itself, for the charter which informed the public of the amount of the capital stock of the corporation, also gave notice that the stockholders were under no obligation to pay more than forty per cent., except on their own vote, carried by a majority of three-fourths, and for a particular purpose.

If the directors had called a meeting of the stockholders to vote on the question of calling in the unpaid sixty per cent. of the stock, and the stockholders had refused their assent, would it have been the duty of the directors, would they have had any power, to call it in, notwithstanding the adverse vote? Clearly not. Is their duty to call in the stock any clearer, or their power any greater because no such meeting has been called and no such vote taken?

The stockholders have made their contract with the corporation, the public have been explicitly advised of its terms, and the stockholders, therefore, can only be held to perform what they have agreed to do. The company can claim no more, nor can the creditors of the corporation say they have been misled.

In my judgment, the stockholders are not liable to pay the unpaid sixty per cent. until the same has been called in by a three-fourths vote of the stockholders, for the purpose of increasing the business of the corporation. Such residue is not due until after such a vote, and the law of this State declares that the stockholder of an incorporated company

is only liable to the company for the unpaid balance due to the company on the shares owned by him. The following authorities have been consulted, and tend to sustain the views expressed: *Bur. & Mo. River Railroad Co.* v. *Boestler,* 15 Iowa, 555; *Penobscot & Kennebeck Railroad Co.* v. *Dunn,* 39 Maine, 587; *Phila. & West Chester Railroad Co.* v. *Hickman,* 28 Pa. St., 318; *Carlisle* v. *Cahawba & Marion Railroad Co.,* 4 Ala. N. S., 70.

It results from these views that there was no error in the charge of the district court. Its judgment is, therefore, affirmed.[1]

[1] *Accord: Bent* v. *Underdown,* 156 Ind. 516, 1900. (The articles of association of the A Company provided that the stockholders should never be required to pay more than 15 per cent. of their subscriptions. These articles were recorded as required by law *in two* public offices of the State. The A Company becoming insolvent, B was appointed Receiver. *Held,* that B could not recover from C, a stockholder, more than 15 per cent. of his subscription. Monks, J.: "The charter of a corporation formed under a general law, consists of its articles of association and the law under which it is organized.")

LANE'S APPEAL.

In the Supreme Court of Pennsylvania, 1884.

105 *Pennsylvania Reports*, 49.[1]

Mr. Justice Green.

In this case a bill in equity was filed by certain creditors of the Philadelphia and Susquehanna Blue Stone Company, suing as well for themselves as for all other creditors who might become parties thereto, against the company and the holders of its capital stock, for the purpose of compelling the payment of the unpaid capital stock by the stockholders in order that the same might be applied to the payment of the debts due the plaintiffs. The bill alleged, and the master found, that the defendant company was incorporated under the general corporation law of April 29th, 1874, that the capital stock was fixed at $24,000, divided into 240 shares at $100 each, that a part only of the stock had been paid in, that the defendants were stockholders at the time of the assignment made by the company for the benefit of its creditors, and were indebted to the company in certain sums, which are set forth in detail, for their unpaid subscriptions to the capital stock, that the company was wholly insolvent, and all its available assets, except the balances due upon its capital stock, exhausted; that neither the company nor its assignee had made any call or assessment upon the stockholders to pay in the unpaid portion of the capital stock, but, on the contrary, had refused to do so, and that payment of such unpaid balances of the capital stock, or of some part thereof, was necessary for the payment of the debts due the plaintiffs. The bill prayed for an account of the amounts remaining unpaid upon the capital stock, and for a decree that the stockholders pay whatever amounts were due by any of them upon previous assessments, and also that an assessment

[1] The Reporter's statement of the facts, and his notes of the arguments of counsel are omitted.

be levied for so much of the balances due, and not previously called for, as might be necessary to pay the ascertained debts of the corporation, and prayed also for the appointment of a receiver to whom the monies collected should be paid, and for general relief. Most of the matters alleged in the bill were admitted in the various answers filed, and such as were material and not admitted were found by the master. The debts due the plaintiffs were ascertained to be upwards of $8,000, of which the sum of $7,036.93 was due to John Maxwell, who had obtained judgment for the same. The amounts of unpaid capital stock were in the neighborhood of $10,000, the whole of which was decreed to be paid to a receiver.

The chief contention before the master, as in this Court, was upon the liability of the stockholders in this proceeding. It was contended, on behalf of the defendants, that they could not be called upon by bill in equity, as proposed in this case, for two reasons: First. Because the complainants have a complete and adequate remedy at law specifically provided by the Act of 29th April, 1874, under which the company was incorporated; and, Second. That the plaintiff, John Maxwell, the principal creditor, had a complete and adequate remedy by attachment in execution upon his judgment.

We will consider these defences separately and in their order.

The remedy at law which it is said could be resorted to by the plaintiffs is that which is provided by the fourteenth and fifteenth sections of the Act of 1874. The fourteenth section is, so far as it relates to the present controversy, in the following words, viz.: "The stockholders in each of said corporations shall be liable in their individual capacity to the amount of stock held by each of them, for all work or labor done, or materials furnished, to carry on the operations of each of said corporations." The fifteenth section provides the method of proceeding to enforce the liabilities created by the fourteenth.

It will be perceived at once that the liability established by the fourteenth section is of a special and extremely limited character. The stockholder is made directly liable for work and labor done, and for materials furnished to carry on the operations of the corporations. But two kinds of indebtedness only are imposed upon the stockholders, indebtedness for labor and indebtedness for materials furnished. No other form or species of debt of the corporation can be collected from the stockholder under this section. Moreover, the liability created by this section is a direct liability from the stockholder to the creditor, and it exists to the amount of the stock held by the stockholder, without any reference to the question whether it has been paid for or not. Hence the stockholder, although he has paid in full to the corporation for his stock, is nevertheless still liable to the extent of the whole value of his stock to the two classes of creditors named.

This liability is, of course, of a purely statutory character, having no existence outside of the legislation, and whenever it is invoked it must be enforced in the very manner prescribed by the other portions of the Act. If that kind of remedy is not literally pursued when that particular liability is proposed to be enforced, then there can be no recovery. Such were the decisions of this court in many cases, notably in Patterson *v.* Lane, 11 Cas., 275; Hoard *v.* Wilcox, 11 Wr. 51; Brinham *v.* The Wellersburg Coal Co., Id., 43; Youghiogheny Shaft Co. *v.* Evans, 22 P. F. S., 331; Means' Appeal, 4 Norr., 75. These were decisions under other Acts, principally the manufacturing law of 1849, but the controlling idea of the whole of them was that the liability and the remedy were special and statutory and therefore the provisions of the statute must be strictly pursued. Nothing more than this was decided in any of them. Thus in Patterson *v.* Lane, which was under the Act of 1849, the 9th section of the Act provided that the stockholders should be individually liable for all the debts and contracts of the corporation, to the amount remaining unpaid

on their shares respectively, until the whole amount of the capital stock was paid in and a certificate by the officers to that effect was made and recorded. It was alleged that a false certificate had been made as to the amount of stock paid in, and that the whole had not been paid, and a bill in equity was filed against certain stockholders to enforce their individual liability. But we held that such a bill would not lie because by the 23d section a special mode of proceeding for that purpose was provided and it must be strictly pursued. This was the whole of that decision. Precisely the same doctrine was held and applied in Hoard *v.* Wilcox, though the source of individual liability was different, and the defect in the proceeding was different, to-wit, the corporation was not joined as required by the statute. THOMPSON, J. said, on p. 58: "It is very evident that the remedy of the statute was not followed in these proceedings, and it is also quite apparent on the face of the lease, that it is under the statute that they seek to make the defendants answerable." He said also: "The remedy for the collection of demands against such institutions is therefore statutory and special and must be followed. This we have lately held in Brinham, *et al.*, *v.* The Wellersburg Co., *et al.*, *ante*, p. 43, in obedience to the rule of the Act of 1806 requiring the remedy prescribed by a statute to be pursued." The other cases referred to above were mere repetitions of the same doctrine applied to the facts involved in them.

In no one of these or any other cases cited in the paper book of the appellants, did any question arise as to the right of a creditor to enforce the equitable obligation of every stockholder in a moneyed corporation to pay the whole amount, if necessary, of his unpaid capital stock, in discharge of *all* the indebtedness of the corporation. That is a species of obligation which is founded in no statute, but exists by force of the consideration that the capital stock of a corporation is a trust fund for the payment of its debts, and upon the happening of the insolvency of the corporation, and the exhaustion of its assets, its unpaid capital stock may

be appropriated for the benefit, not of any one creditor, but of the whole body of creditors. In none of the manufacturing laws of this Commonwealth is there any substitution of any form of equivalent liability for this. On the contrary, the special, limited and restrained forms of liability established by these Acts, are in the nature of penal obligations for derelictions of duty, or additional personal monetary duties imposed upon stockholders in favor of laborers, mechanics and material men, out of consideration for the meritorious character of the claims. They are an added means of satisfaction to these two classes of creditors under the Act of 1874, but substitutionary for nothing. They may be resorted to or they may not. If they are it must be in the precise methods, and within the special limits imposed by the legislation which authorizes them. But if they are not, upon what principle of law or morals shall it be said that these two meritorious classes of creditors shall be literally ousted of other rights and remedies available to all creditors, simply because of the relation of creditor to the common debtor.

It is true that in the bill in this case the complainants, other than Maxwell, allege that the debts due them are for work and labor done, and materials furnished; and as to Maxwell, proof was offered, and refused, to show that the consideration of his judgment was for materials furnished. But of what consquence is this? The learned counsel for the appellants argue with much ingeunity and earnestness, that because a statutory and peculiar remedy is given to creditors of this character, that one remedy alone must be pursued, and if it is not, all their other remedies against the same parties are taken from them. In other words, laborers and material men can make the stockholders pay them, because they are stockholders, and by the statute are bound to pay such claims in addition to paying for the whole of their stock, and because they have this right it is their sole, only right of redress against such persons. It is conceded that all other creditors can require the stockholders to pay in their

unpaid capital stock in satisfaction of their claims, but it is contended that laborers and material men cannot do so, because they have a right peculiar to themselves to resort to an additional remedy which enables them to call upon the stockholders, although they may have paid up the whole price of their stock. The answer to this is very simple. The laborers and material men are creditors of the corporation in as large and broad a sense as all other creditors, and of course in that capacity they have all the remedies which are common to the whole mass. In addition to that, they have a special remedy which the others do not possess. This might be availed of if the other failed, but, in no possible view of the case can we hold that its existence deprives them of other remedies common to all creditors alike.

The doctrine that the capital stock of a moneyed corporation is a trust fund available to creditors in the event of insolvency is admitted by the appellants, and is established by very numerous decisions. A few of them are the following: Sawyer *v.* Hoag, 17 Wall., 610; Sanger *v.* Upton, 1 Otto, 56; Hatch *v.* Dana, 11 Id., 205; Wood *v.* Dummer, 3 Mas., 308; Webster *v.* Upton, 1 Otto. 65; Wilbur *v.* The Stockholders, 35 Leg. Int., 346; Story's Equity, § 1252; Vose *v.* Grant, 15 Mass., 505; Spear *v.* Grant, 16 Mass., 9; Stang's Appeal, 10 W. N. C., 409; Messesmith *v.* Bank, 15 Norr., 440. In Upton *v.* Tribilcock, 1 Otto, on p. 47, the doctrine is thus fully and forcibly expressed: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded." In Sanger *v.* Upton, 1 Otto, 60, it is said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. . . . . The creditors have a lien on it in equity. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this

pledge, and as much a part of the assets of the company as the cash which has been paid in upon it."

It is also entirely clear that the creditors of an insolvent corporation may compel, by bill in equity, the payment of the unpaid capital stock in discharge of their debts. Thus in Myers, Assignee, *v.* Seeley, 10 Nat. Bankruptcy Reg. Rep., 412, it was said: "Bills by creditors who have judgments against the corporation have been sustained against the corporation and its stockholders, said bills being framed in the name of the judgment creditors, and of all others who may choose to come in and be made parties thereto. In such cases the decree has been for an account to be taken of the debts and assets of the corporation, for the appointment of a receiver to whom the stockholders and officers are ordered to pay and account respectively for so much of the assets and capital stock as are necessary to pay the debts due to the creditors; the assets thus collected and received to be applied by the receiver in discharge of the debts." There are other numerous authorities to the same effect, but it is unnecessary to repeat them, as the right to such a remedy is not at all disputed by the appellants, if any right of recovery exists. * *[2]

The second defence alleged relates to the plaintiff, John Maxwell, who was the holder of about seven-eighths of all the indebtedness of the corporation. Mr. Maxwell had obtained a judgment for his debt, and it was argued he had a complete and adequate remedy at law by process of attachment in execution.

This writ is simply a species of execution, the purpose of which is to obtain satisfaction of the judgment upon which it is founded. It is not an original proceeding instituted to enforce a real or supposed legal or equitable liability by the procurement of a judicial decree as its result. In other words, it is not a remedial process, and can scarcely be spoken of as a remedy in the sense in which that term is used in considering the subject of an adequate legal remedy

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[2] The Court's discussion of the liability of an assignee of an original stockholder is omitted.

which excludes a bill in equity. But leaving that thought aside, we cannot concede the correctness of the appellant's contention in this regard.

In considering this subject it is necessary to observe some distinctions which must be borne in mind. There is no doubt that a contract of subscription to the stock of a moneyed corporation imposes upon the subscriber an obligation to pay to the corporation the amount of the subscription, according to the terms of the contract. If he fails to pay, the corporation may sue him at law upon his contract and recover whatever may be due. But recovery in this mode must be in accordance with the terms of the contract. If by those terms payment was to be made in any particular manner, or only of a certain portion of the par value, with an agreement that no more was to be paid, such contract is valid and binding upon the corporation. But if the corporation becomes insolvent and all its other assets are exhausted, and it is requisite for the payment of its debts that its unpaid capital should be paid up, then the law changes, and it is perfectly well settled by many decided cases, that all stipulations, conditions and devices agreed upon between the stockholders and the corporation, releasing the former from their obligation to pay in cash the full par value of their stock, become nugatory and void. Notwithstanding such terms of subscription the stockholders, in such circumstances, can be compelled to pay in full for their stock. This doctrine results from the character of the capital stock of corporations. It is a trust fund. It exists for the benefit of the creditors whenever their rights and interests require it. Its payment can be enforced in modes which are not available to the corporation and without using its name. Thus, creditors' bills in the names of individual creditors, whether by judgment or otherwise, proceedings by assignees in bankruptcy, either directly by bill or by petition to the court in bankruptcy, and proceedings by insolvent assignees or receivers under direction of the proper courts, are the ordinary modes in which the rights of the creditors are enforced in

the circumstances we are now considering. In all of them, however, it is absolutely essential that in some mode there should be an ascertainment in some form of the fact of insolvency, of the exhaustion of all other assets, of the amount of the debts due by the corporation, of the amount of capital stock required for the discharge of the debts, and a call or assessment upon the stockholders for the payment of the amount necessary to be paid by each. If the contract of subscription is absolute and without conditions or terms relieving the stockholders from the payment of the full par value of the stock, the call or assessment may be made by the directors of the corporation, and if the corporation is *sui juris* and has not passed into the hands of assignees or receivers, the proceeding to recover the money may be prosecuted by the corporation in its own name. If, however, the corporation refuses to act, or is disabled, either by the terms of its contract, or by its legal incapacity by reason of insolvency or bankruptcy, the assessment must be made by some court having jurisdiction of the matter and the parties, in some suitable proceeding by way of bill or petition. Upon such proceeding and the establishment of the requisite facts above stated, the court will either order an assessment to be made upon each stockholder of the amount to be paid by him, and upon such assessment an action can be founded and tried in the common law courts, or a decree can be made directly against each stockholder who has been made a party and served with process, for the payment of the money due by him, and such decree can be enforced by immediate execution process.

These principles are announced and illustrated in many cases: Wood *v.* Dummer, 3 Mason, 308, 314; Sagory *v.* Dubois, 3 Sandf. Ch. Rep., 467; Ward *v.* Griswoldville Manuf. Co., 16 Conn., 593; Ogilvie *v.* Knox Ins. Co., 22 How., 380; Mann *v.* Pentz, 3 Comst., 415, 423; Adler *v.* The Milwaukee Patent Brick Manufacturing Co., 13 Wisc., 63; Myers *v.* Seeley, 10 Nat. Bank. Reg. Rep., 411; Upton *v.* Tribilcock, 1 Otto, 45, 47; Sanger *v.* Upton, Id., 56, 60;

Webster *v.* Upton, Id., 65; Wilbur *v.* Stockholders, 39 Leg. Int., 346; Scovill *v.* Thayer, 15 Otto, 143; Patterson *v.* Lynde, 16 Id., 519; Sawyer *v.* Hoag, 17 Wall., 610.

The question whether an attachment in execution will lie at the suit of a single creditor to secure payment of his own debt to the exclusion of all other creditors is one whose solution depends upon the application of some of the principles above stated. If the corporation is solvent, and the subscription is in the ordinary form of an absolute engagement to pay the price of the stock, there is no doubt that an attachment in execution is an effective remedy for a judgment creditor of the corporation. The reason is that in such circumstances the amount due by the subscriber to the stock is an ordinary debt due directly by the stockholder to the corporation, the payment of which may be enforced in an action on the contract of subscription. Being a debt due, there is a right of action for its recovery by the company, and therefore it is strictly and properly subject to seizure by attachment. Hence it was held in Peterson *v.* Sinclair, 2 Norr., 250, that a balance due on a subscription to stock of a corporation is attachable as other debts are. No question of the solvency or insolvency of the corporation was raised or considered in that case.

In Hays *v.* Lycoming Fire Ins. Co., 2 Out., 184, an attachment was sustained against money due upon an assessment on the premium notes of the company for the purpose of paying losses, but it was expressly said by our brother Gordon in the opinion that it was admitted the company was solvent, and the case was not complicated by the question of insolvency. It was held that as the company was solvent and the premium notes were assessable for the payment of the very debt in suit, and the assessment was lawfully made and the money partially paid into the hands of one of the garnishees, it was to be treated as any ordinary debt and subject to attachment as other debts. In another case between the same parties, reported in 3 Out., 621, the facts were that a member had sustained a loss by fire, for

which he had brought an action and obtained judgment before the insolvency of the company. An attachment in execution was issued, also before insolvency, and served upon a member who had given a premium note for his insurance. He became indebted upon his note, before insolvency, for the proportionate part necessary to pay the plaintiff's loss, and nothing remained to be done except to ascertain the amount of that proportion. Upon these distinct grounds the attachment was sustained. Mr. Justice TRUNKEY in delivering the opinion said, on p. 625. "The garnishee gave his notes to the defendant, to be paid in such portions and at such times as the directors may, agreeably to the Act of incorporation, require. The losses by fire occurred, and this judgment for one of said losses was obtained prior to the proceedings for dissolution of the company. Before its dissolution the garnishee became indebted on his premium notes for the proportionate sum necessary for payment of said losses, and nothing remained to be done except to ascertain the proper amount of his indebtedness prior to his liability to an action to enforce payment. The writ of attachment was issued and served before the dissolution of the company, and the debt owing to the defendant by the garnishee became bound by it. After the receiver was appointed by order of the Court, he ascertained the measure or amount of the debt which would be levied upon by the attachment of the plaintiff."

The foregoing are the only cases of attachment in execution in the Pennsylvania Courts to which we are referred, and with the exception of the cause *In re* Glen Iron Works, bankrupt, 13 W. N. C., 387, to be hereafter considered, are all we have found in the books of reports relating to this subject. But there are many cases, as it seems to us, settle the principles which ought to control the decision of the question.

In order to sustain an attachment in execution there must be a debt due from the garnishee to the defendant in the judgment, which may be payable at the time of the

service of the writ, or may become payable subsequently. This debt must be at least a cause of action. If it be not, so that it cannot be enforced by the defendant against the garnishee, it certainly cannot be converted into a cause of action by the mere consideration that an attachment has issued instead of a summons in a common law action. If there is an inherent defect in the cause of action itself which prevents any recovery by the defendant or his representatives because of the nature of the defect, it is not possible that such defect can be regarded as removed simply because another proceeding is adopted.

Now, it is manifest, upon the plainest principles, that in the case of an insolvent corporation, all of whose assets are exhausted except its unpaid capital stock, there can be no recovery against a delinquent stockholder until a call or assessment has been made upon him fixing the amount he is required to pay. Prior to insolvency this might be done by the corporation if it is not disabled by the special terms of the subscription contract. But when insolvency and exhaustion of assets exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one, or of several, or of all the creditors, the result is the same in each. The capital, when recovered enures to the benefit of all, and must be distributed among all ratably. Before any recovery can be had in such proceedings, no matter of what particular form, there must be an assessment made by a competent authority. The necessity for an assessment arises from the consideration that only so much of the unpaid capital can be called in as is required for the payment of the unsatisfied debts. If the whole unpaid capital is not required the whole cannot be called. In order to ascertain how much is required there must be an account of debts, assets, and unpaid capital taken, and then a decree for an assessment of the amount due by each stock-

holder. Thus in Mann *v.* Pentz, 3 Comst., on p. 423, the Court said: "This liability (for unpaid capital) is only incurred when the capital paid in is not sufficient to satisfy the debts against the corporation, and then only to an amount sufficient to satisfy such debts. It is therefore necessary that an account of the assets and of the debts should be taken, of the amount of capital remaining unpaid upon the shares, and the amount unpaid by each stockholder, in order that they may be made equally liable."

In Myers *v.* Seeley, 10 Nat. Bank, Reg. Rep., 411, the court after stating the rule says: "The reason of that rule is, that the unpaid subscriptions are assets applicable to the payment of corporate debts which the corporate authorities may call in for corporate purposes. If there are adequate assets other than said calls, then the creditor has no legal or equitable right to insist upon such calls. Primarily the amount due on subscriptions is a debt due to the corporation which it alone can enforce, and unless the corporation is without other assets to meet its obligations, and fails to make the needed calls, creditors cannot interpose. When the facts justify their interposition, an account of assets and debts should be taken, in order that it may be known what, if any, calls should be made. No further call should be made than what is sufficient, together with the other assets, to meet all debts; for the bill by creditors cannot reach beyond the satisfaction of their demands. They have no other equity."

In Wilbur *v.* The Stockholders, 39 Leg. Int., 346, Cadwalader, J., said: "Where the corporation is solvent, the unpaid capital is not due and payable by the stockholders until payment in part or in whole is called for by the corporate authorities, unless a postponement of the payment would be inconsistent with some provision of the Act of incorporation, or with a conventional engagement with the stockholders. Ordinarily there is no such inconsistency of either kind, and thus in the case of a solvent corporation, a call or levy by the corporate authorities assessing the amount or amounts payable must ordinarily precede any ascertained

obligation of the respective stockholders to pay. But in the contrary case of an *insolvent* corporation the recourse of its creditors does not depend upon such condition precedent, and cannot be thus postponed. Every stockholder is, with relation to creditors, under an obligation to pay so much of the amount represented by his share, or shares, of the capital as may be required for the payment of the corporate debt. . . . Upon the insolvency of the corporation the obligations of the stockholders thus at once becomes assets for the payment of its debts to such an extent as other assets are deficient. To this extent the obligation of every stockholder, in its just proportion, then becomes in equity a debt payable for the benefit of the creditors. No act of the corporation before or after its insolvency can derogate in this respect from the rights of creditors." In Webster *v.* Upton, 1 Otto. 71, STRONG, J., says: "All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent."

The foregoing principles which are expressed in many cases indicate the fundamental conditions which underlie the whole subject of the liability of the stockholders as to their unpaid capital stock. Such stock in cases of insolvency is due as an entirety: it is due to the aggregate of the creditors; only so much is due as is requisite to discharge the indebtedness of the corporation after all other assets have been thereto applied; as a necessary consequence there must be an account of debts, assets and unpaid capital taken; when such account has been taken, and the amount required from each stockholder has been ascertained, an assessment ordering the payment of such proportionate amount by each may be made by a court of competent jurisdiction in a proceeding in which the corporation and the stockholders should be made defendants.

I consider it as the clear result of the decisions that, ex-

cept in cases where the corporate authorities have themselves made calls which are authorized by the subscription contracts, there is absolutely no liability of any kind whatever on the part of the stockholder to pay any part of his unpaid capital, except under and by force of an assessment made as above stated. If this be true there is nothing upon which an attachment can fasten at any time prior to the assessment. I apprehend this conclusion is sustained by specific authority which I now proceed to indicate:

The case of Chandler, Receiver, *v.* Siddle, a stockholder, 10 Nat. Bank, Reg. Rep., 236, was an action at law by a receiver of an insolvent insurance company against a single stockholder, to collect eighty per cent., unpaid, of the defendant's subscription to the capital stock of the company. The subscription contract provided for the payment in installments, of twenty per cent. of the stock, and that the balance should be subject to the call of the directors as they may be instructed by a majority of the stockholders represented at any regular meeting. There was no call by the directors, and the Receiver brought an action at law on the contract to recover the eighty per cent. against one stockholder defendant. The Circuit Court of the United States for the Southern District of Illinois, MILLER, J., in disposing of the case, said on p. 238: "In this action at law, in which neither the corporation nor its stockholders other than the defendant are before the court, and in which the suit is on the contract of subscription for the entire eighty per cent. alleged to be due, I am of opinion, considering the terms of that contract, and that no call or assessment is alleged, either by the company before the insolvency, or by the court since, that the petition does not state *a cause of action*. In other words, in this action at law on the contract there must be a call or assessment, or something standing in the place thereof and equivalent thereto, either by the company, or by a proper court in order to make the defendant liable."

If there was not a cause of action, nothing to make the

defendant liable without an assessment, surely there could be nothing to serve as the foundation of an attachment. For the writ of attachment cannot *create* a liability. It can at best appropriate a liability already existing. But if it already existed it could be enforced in the proceeding on the contract. The attachment is also on the contract alone where there has been no assessment, and must fall with the action at law built upon the same foundation. * * *[3]

Decree affirmed.[4]

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[3] The Court's further discussion of cases illustrating its position is omitted.

[4] *For cases in relation to the right of a judgment creditor of a corporation to resort to the process of garnishment* to obtain satisfaction of his debts out of what is due by the stockholder to the corporation on account of his debt, see Thompson on Corporations, Edition of 1910, sec. 5843, notes; also Amer. Dig. tit. Corporations, Key No. 255. The remedy by process of garnishment has been extended by statute. Thus in Alabama, section 2182, code of 1896, provides that any judgment creditor of a corporation, having an execution returned no property found, may by garnishment, subject the unpaid subscription of any stockholder to the payment of his debts "without regard to whether the corporation can maintain suit against the stockholder for each subscription or not." See *Enslen* v. *Nathan,* 136 Ala. 412, 1902.

See, on the subject of creditors' bills generally, Thompson on Corporations, Edition 1910, sec. 5083 and cases cited; also Amer. Dig. tit. Corporations Key No. 259 (8).

On the rights of creditors to have receivers appointed see Thompson on Corporations, Edition 1910, sec. 6351, and cases cited; also Amer. Dig. tit. Corporations, Key No. 556.

Compare with our principal case, Hatch v. *Dana,* 101 U. S. 205, 1879. (Strong, J. : "This bill is an ordinary creditors' bill, the sole object of which is to obtain payment of the complainant's judgment. It is true it is brought on behalf of the complainant and all other creditors of the corporation who might choose to come in and seek relief by it, contributing to the expense of the suit. But no other creditors came in; and it does not appear that there is any other creditor, unless it be one of the stockholders, who was made a defendant, and who filed a cross-bill which he afterwards dismissed. All the stockholders were not made defendants.

"The bill was not a bill seeking to wind up the company. It sought simply payment of a debt out of the unpaid stock subscriptions.

"That unpaid stock subscriptions are to be regarded as a fund, which the corporation holds for the payment of its debts, is an undeniable proposition. But the appellants insist that a creditor of an insolvent corporation is not at liberty to proceed against one or more delinquent subscribers to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution. They insist, also, that by the terms of the subscriptions for stock made by these appellants they were to pay for the shares set opposite their names respectively, 'as called for by the said company;' that the company made no calls for more than thirty per cent.; that, therefore, this company could not

recover the seventy per cent. unpaid without making a previous call; and that a court of equity will not enforce the contract differently from what was contemplated in the subscription.

"These positions, we think, are not supported by the authorities,—certainly not by the more modern ones,—nor are they in harmony with sound reason, when considered with reference to the facts of this case. The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes.")

Potts v. *Wallace*, 146 U. S. 689, 1892. (The A Co. made an assignment to B for the benefit of creditors. B brought an action against one William H. Wallace, a stockholder, for the full amount of his subscription, no part of which had been paid. Shiras, J., in the course of his opinion said: "Another ground of defence urged was that the plaintiff had mistaken his remedy; that the proceeding to enforce the liability of Wallace should have been by a bill in equity.

"We might dismiss this position by the observation that it does not appear to have been taken by the defendant in his answer, or to have been brought to the attention of the court at the trial.

"As, however, for other reasons, the case has to go back for another trial, it may be well for us to briefly consider the merits of the suggestion.

"It is undoubtedly true that, in Pennsylvania, in the case of an insolvent corporation, its assets, including unpaid capital stock, constitute a trust fund, and that such fund cannot be appropriated by individual creditors, by means of attachments or executions directed against particular assets, but should be distributed, on equitable principles, among the creditors at large.

"Accordingly, it was ruled by the Supreme Court of Pennsylvania in *Lane's Appeal*, 105 Penn. St. 49, and in *Bell's Appeal*, 105 Penn. St. 88, cases cited by defendant's counsel, that a bill in equity is a proper remedy whereby to subject the property of an insolvent corporation to the claims of its creditors.

"Some general expressions were used in those opinions, cited in the brief of defendant's counsel, which seem to countenance the proposition that the only remedy in each case is by a bill in equity. But an examination of the facts of the cases and of the reasoning of the opinions clearly shows that what the court meant was that the proceeding must, in some form, be a remedy for all, and not for some, of the creditors—that the remedy must be coextensive with the nature of the property as a trust fund.

"That this is the proper reading of those cases is shown by the later case of *Citizens' Savings Bank* v. *Gillespie*, 115 Penn. St. 564, 572. That was the case of a suit brought by an assignee of an insolvent bank

for the benefit of creditors against a subscriber for stock remaining unpaid, and the Supreme Court, per Paxson, C. J., said:

"'There being no assessment in evidence, the learned judge left it to the jury to find whether the whole of the unpaid subscription was required to pay the debts of the company. We see no error in this. If the unpaid subscriptions were required to pay the creditors, no assessment was necessary, under the authority of *Yeager* v. *Scranton Trust Company*, (14 Weekly Notes of Cases, 296.) * * * It was there said that "the uncontradicted evidence shows that it was necessary to collect the whole of this stock subscription in order to pay the sums due the depositors of this insolvent corporation." There is not even an apparent conflict between the case referred to and the later cases of *Lane's Appeal*, 105 Penn. St. 49, and *Bell's Appeal*, 115 Penn. St. 88, 564. Those were creditors' bills, filed against insolvent corporations, to compel the payment by the stockholders of their unpaid subscriptions, and it was held that, in such cases, there must be an account taken of the amount of debts, assets and unpaid capital, and a decree for an assessment of the amount due by each stockholder. The reason of this is plain. (Upon the insolvency of a corporation a stockholder is liable for only so much of his unpaid subscription as may be required to pay the creditors. Hence, he may not be called upon in an arbitrary way to pay any sum that an assignee or creditor may demand. It is, therefore, requisite to ascertain, in an orderly manner, the extent of the stockholders' liability before proceedings are commenced to enforce it. But the necessity for this does not exist when the whole amount is required to pay the debts. Hence, *in such cases*, as was said in *Yeager* v. *Scranton Bank*, *supra*, *an assessment is not essential. The assignee may sue at once, for all is required.*'

"At the trial in the present case (see page 27 of the record), the counsel for the defendant consented to take the statement of the company's clerk, without contradicting it, that the assets of the company appeared to be $250,000 and the liabilities $270,000 to $275,000. It was not necessary, therefore, to have a preliminary assessment against Wallace, as the jury could have found, under the concession of his counsel, that the entire amount of his unpaid stock was necessary to meet the indebtedness of the corporation. We understand the concession to mean that the debts exceeded the assets, including the unpaid subscriptions of the defendant and the other stockholders. If we are wrong in this, the defendant can show the facts, and invoke, if he be so advised, the doctrine of *The Savings Bank* v. *Gillespie*, if, indeed, that doctrine will avail him").

A bill in equity would appear to be the only practical proceeding where the creditor is himself a stockholder, if the substantive rights recognized in the following case are to be worked out:

Blood v. *La Serena Land and Water Co.*, 150 Cal. 764, 1907. (A was a creditor of a Company and also a stockholder. The amount due by A on his stock exceeded the indebtedness of the Company to him. A obtained a judgment against the Company for the amount due him, and then proceeded against the Company and his fellow stockholders to recover from the latter their unpaid subscriptions and apply the same in satisfaction of his judgment. Sloss, J.: "The just and equitable rule appears to us to be that declared in *Bissit* v. *Kentucky River Navigation Co.*, 15 Fed. 353, and *Wilson* v. *Kiesel*, 9 Utah, 397, [35 Pac. 488] —*i. e.*, that in such case the plaintiff stockholder must contribute ratably with the defendant stockholders toward the liquidation of his demand against the corporation. This was the principle applied by the trial court as enunciated in the conclusion of law above quoted. Under it the court ascertained the total amount of the plaintiff's claim, and apportioned the payment of that claim among the plaintiff and the defendants in proportion to the amounts respectively due from them for unpaid subscriptions.")

COIT *v.* GOLD AMALGAMATING COMPANY.

In the Supreme Court of the United States, 1886.

119 *United States Reports*, 343.

This was a bill in equity against a corporation and its stockholders to enforce a debt due from the former against the latter. The case is stated in the opinion of the court.[1]

Mr. Justice Field: The defendant, the North Carolina Gold Amalgamating Company, was incorporated under the laws of North Carolina, on the 30th of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing and assaying ores and metals, with the power to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the company for $5489, recovered in the Court of Common Pleas of Philadelphia, on the 18th of May, 1879, upon its two drafts, one dated June 1st, 1874, and the other August 15th, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them, alleging that he had frequently applied to the officers of the company to institute a suit for that purpose, but that under various pretences they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at $100,000 divided into 1000 shares of $100 each, with power to increase it from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might

[1] The Reporter's notes of the arguments of counsel are omitted.

be paid "in such instalments, in such manner and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss, or damages, or be responsible beyond the assets of the company.

Previously to the charter, the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a corporation. Upon obtaining the charter, the capital stock was paid by the property of the former association, which was estimated to be of the value of $100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property; and the average estimate amounted to $137,500. This sum they reduced to $100,000, inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only

a part of the instalments has been paid. In that case there is still a debt due to the corporation, which, if it becomes insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. *Boynton* v. *Hatch*, 47 N. Y. 225; *Van Cott* v. *Van Brunt*, 82 N. Y. 535; *Carr* v. *Le Fevre*, 27 Penn. St. 413.

But the allegation of intentional and fraudulent undervaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the corporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital, that no implication could be raised against the entire good faith of the parties in the transaction.[2]

Judgment affirmed.[3]

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[1] The remainder of the opinion, relating to alleged liability on stock issued after the plaintiff had extended credit is omitted.

[2] *For cases in accord*, see Thompson on Corporations, Edition of 1910, §4937, note 24; also Amer. Dig., tit. Corporations, Key No. 232 (3).

Compare with our principal case.

Dieterle v. *Ann Arbor Paint and Enamel Co.*, 143 Mich. 416, 1906. (The A Co. was insolvent. Members of the A Co. paid for their subscriptions to the shares of the B Co. in stock of the A Co. *Held*, that such payment was no defense by stockholders of the B Co. sued by a creditor of the B Co. to enforce their liability as subscribers.)

Hobgood v. *Ehlen*, 141 N. C. 344, 1906. (A statute of Delaware provides: "Any corporation existing under any law of this State may issue stock for labor done or personal property or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases

shall be conclusive." The value of the property in the business of A and B was $896.63. A, B, and C organized a Company under the laws of Delaware with a capital of $100,000; the directors valued the property of A and B, at $100,000; took over the business of A and B and issued the entire capital stock therefore. *Held,* that the jury were justified in drawing the conclusion that there was actual fraud on the part of the directors.)

Lester v. *Bemis Lumber Co.,* 71 Ark. 379, 1903. (A statute permitted subscription to stock to be paid in property. A paid for his subscription in the B Co. by stock in the C Co. *Held,* that as one company in the State could not hold stock in another company, there was no payment for the stock, although had the B Co. realized anything on the stock A could be credited with the amount realized, and that A was liable to a creditor of the Company for the full value of the stock.)

See v. *Heppenheimer,* 69 N. J. Eq. 36, 1905. (A statute of New Jersey authorized stock of corporations to be issued for property. B *et al.,* each owned separately straw paper mills, the total value of which was about $2,200,000. A and B, *et al.,* entered into a transaction, the final result of which was that a Company was formed, the mills were acquired by the Company, the property mortgaged by the Company for $1,000,000, and $5,000,000 of stock issued against the property. The stock and bonds were distributed between A and B, *et al.,* the idea of the promoters being than in estimating the value of the mill properties, as the new corporation was going to run these properties, the value of the good will of the different businesses, and the prospective profits of the new Company due to the savings to be effected and the monopoly acquired by running the different mills as one business, could be valued as property against which, under the statute, stock could be issued. The Court refused to regard either as property, and *held,* that the stock had been issued at an inflated value, and that the creditors of the Company could force the holders to pay the difference.")

WINSTON *v.* THE DORSETT PIPE & PAVING CO.

IN THE SUPREME COURT OF ILLINOIS, 1889.

129 Illinois Reports, 64.[1]

MR. JUSTICE MAGRUDER: This is a bill filed by the appellant, F. H. Winston, as a stockholder in the Dorsett Pipe and Paving Company, a corporation organized under the laws of this State, against said company, and its creditors, and the other stockholders, all of whom are parties defendant to this proceeding. The bill seeks the dissolution of the corporation, the appointment of a receiver, the sale of the corporate assets, the assessment of the shareholders, and the payment of the creditors.

The company was organized in 1881 with an authorized capital of $125,000.00, divided into shares of $100.00 each. Among the original subscribers to the stock, who participated in the organization, were the following persons, whose subscriptions were as follows: F. H. Winston, 50 shares, $5000.00; Joseph Stockton, 100 shares, $10,000.00; M. S. Chase, 100 shares, $10,000.00; I. S. Waterman, 100 shares, $10,000.00; I. S. Waterman, trustee, 637 shares, $63,700.00. Waterman died before the filing of the bill, and his executors were defendants in the court below. The only appellants in this case are F. H. Winston, the complainant, and Stockton and Chase, two of the defendants. The appellees, who are chiefly interested in the controversy, are the executors of Waterman's estate. None of the creditors, and none of the stockholders, except the three appellants, complain of the decree of the Circuit Court.

The decree assesses the whole amount of indebtedness, found to be due, against all the stock, subject to assessment, except that known as the "Waterman trustee stock," amounting originally to 637 shares. It is only this feature

[1] The Reporter's notes of the arguments of counsel are omitted.

of the decree which the appellants complain of. They claim that the trustee stock should have been made to bear its *pro rata* share of the indebtedness, and that, by the failure of the court below to assess it, along with the rest of the stock, they are compelled to contribute more than their fair proportions towards the discharge of the debts of the company.

The original subscribers to the stock, besides those already named, were D. H. Dorsett, 250 shares, $25,000.00; I. P. Ellacott, 10 shares, $1000.00; F. S. Winston, Jr., 3 shares, $300.00. After 613 of the 1250 shares had been subscribed for, there was nobody to take the remaining 637 shares. It was deemed advisable to organize the corporation at once, and to proceed with the business as soon as possible. Under the statute a certificate of organization could not be obtained from the Secretary of State, until the capital stock should be fully subscribed. Accordingly it was suggested, at the gathering of the original subscribers above named, and while they were engaged in signing their names to the subscription paper, that Waterman, who was the prime mover and chief promoter of the scheme, should subscribe for the 637 shares, as trustee. In pursuance of this suggestion he signed the list: "I. S. Waterman, trustee, 637 shares, $63,700." The caption of the paper, so signed by him and the others, is as follows: "We, the undersigned, hereby severally subscribe, for the number of shares set opposite our respective names, to the capital stock of the Dorsett Pipe and Paving Company, and we severally agree to pay the said company for each share the sum of one hundred dollars."

There is some uncertainty expressed by some of the witnesses as to the persons, for whom Waterman was acting as trustee when he so signed his name. We deem it unnecessary to consider whether he was technically a trustee for the corporation, or for the stockholders, or for the future distributees of the stock. After a careful examination of all the evidence we are satisfied, that there was a definite understanding between him and the other subscribers, as to the

purpose for which he took the stock, and as to the nature of the liability, which he assumed thereby. It was understood, that, after the report should be made to the Secretary of State, and the complete organization of the corporation should be effected, Waterman should go to work to dispose of the stock to third parties, and that the other stockholders should help him to so dispose of it. As between him and his co-stockholders, he was not to be liable upon the stock, and was not to be required to pay assessments upon it. It was explained to him and he was fully aware, that, as between him and creditors of the company, he would be held liable upon his subscription for the 637 shares. * * * *[2]

As between the creditors of the company and Waterman, he must be regarded as a subscriber for the 637 shares. The fact that he placed the word, "trustee" after his name would make no difference in his liability to the creditors. "Where shares are held by a person as trustee for another, the legal holder of the shares, and not the equitable owner, is primarily liable both to the company and to its creditors." (2 Morawetz on Corp. sec. 853.) Appellees admit that the estate of Waterman is liable to be assessed upon the shares held by him as trustee, if such assessment becomes necessary in order to pay the debts of the corporation. The rights of the creditors in this regard are recognized by the decree of the trial court.

But, in view of the understanding among the stockholders that the trustee stock should not be subject to assessment as between Waterman and the original subscribers, the Circuit Court, by its decree, makes an assessment against the stock, other than the trustee stock, reserving the right to make further assessments if the same shall be needed. The decree provides that "in case money enough cannot be realized from the assessments upon the stock, which is liabel to contribute to and be assessed as aforesaid for the payment of the valid debts and obligations of the said corporation, then the said executors of said James S. Waterman, deceased, shall be required to pay also, upon the said stock

[2] The Court's examination of some of the testimony is omitted.

taken by James S. Waterman as trustee, such sum as may be necessary to pay said deficiency." The executors are assessed upon the $10,000.00 of stock, subscribed for by Waterman individually.

We cannot see why, under the facts disclosed by this record, the decree of the court below is erroneous in holding, that the trustee stock should not be assessed primarily and in the first instance, as between these three appellants and the Waterman estate. The decree does not require the appellants to pay more than they owe. Neither of them ever paid his subscription to the capital stock in full. Unpaid subscriptions to the capital stock of a corporation constitute a trust fund, which may be subjected to the payment of the debts, like any other asset. The assessments made by the present decree against the appellants respectively do not exceed, or equal, the several amounts due from them upon their unpaid subscriptions. There is no hardship in requiring them to carry out the arrangement as to the trustee stock, made with Waterman in their presence and with their consent, and of which they reaped the benefit by a speedy organization of the Pipe and Paving Company.

In most of the cases, where subscriptions to the capital stock of corporations have been condemned, as being conditional, or accompanied by secret or qualifying agreements, the rights of creditors or stockholders have been prejudiced. Creditors are entitled to look to the stock as it appears upon the face of the subscription list. Each stockholder has a vested right in the contract for subscription of every other stockholder. In the case at bar, no creditor is injured, and no creditor is complaining. The appellant stockholders cannot object to the release of stock, which they permitted to be subscribed for with the understanding that, so far as they themselves were concerned, it should be released. We are of the opinion that the Appellate Court committed no error in affirming the decree of the Circuit Court.

The Judgment of the Appellate Court is, therefore, affirmed.

Judgment affirmed.

FIRST NATIONAL BANK OF DEADWOOD
v.
GUSTIN MINERVA CONSOLIDATED MINING CO.

In the Supreme Court of Minnesota, 1890.

42 Minnesota Reports, 327.

Mitchell, J. This action was brought upon a debt of the defendant company, a corporation organized under the laws of Dakota territory, and against the other defendants, citizens of this state, as stockholders, to obtain judgment against the company for the amount of the debt, and against the other defendants for the respective amounts alleged to be due and unpaid on the stock held by them, so far as necessary to satisfy the judgment against the corporation. * * *[1]

The findings of fact, so far as here material, are, in substance, as follows: Prior to November 13, 1886, there had been organized, and were at that date in existence, under the laws of Dakota, two mining corporations, viz., the Gustin Belt Gold Mining Company, and the Minerva Mining Company, of the latter of which the plaintiff, a national banking association of Deadwood, Dak. was a creditor. On the date named the defendant corporation was organized for the purpose and with intention of consolidating the other two companies, acquiring their property, and with the property so acquired carrying on a general mining business. "At the time of the organization of the defendant company, and as the scheme on which the same was based, it was agreed by the parties so incorporating, and by those representing and having authority to act for the two existing companies, that all the mines and mining property of such two corporations should, upon its organization, be transferred and conveyed to the new, or defendant, company, and constitute its en-

[1] The Court's discussion of certain matters of practice are omitted.

tire capital stock and resources for the prosecution of its enterprise, and be represented in such organization by a nominal capital stock of $2,500,000, divided into 250,000 shares, of $10 each, which should all be deemed and held as represented by the properties so conveyed to it; that 50,000 of said shares should be issued to the former shareholders of each of the two old companies, and the remaining 150,000 shares belong to and constitute the working capital of the new corporation, and be sold under its authority, and on such terms as it should direct; and the proceeds of such sales constitute a fund to pay off the debts on the properties, and develop the mines thereon, and be used generally in the prosecution of the business of the new corporation, for the benefit of all its stockholders. That it was never expected or intended by such corporation, or by those to whom its stock was issued, that any subscription to the capital stock of the new company should ever be made, or that any capital stock should ever be taken, or any capital subscribed for or paid in, except by conveyance to it of the mining properties referred to, and the sale of the stock reserved for its working capital, in open market, for such sum as could be obtained therefor." This scheme was carried into effect by the conveyance to the new or defendant corporation of the properties of the two old corporations, and the issue to their stockholders, according to their respective holdings, of 100,000 shares of the stock of the new company (called in the findings "Old Company Stock") as paid-up stock, and by placing the remaining 150,000 in charge of the board of directors, to be by them sold in the open market for such price per share (not less than 50 cents) as could be obtained therefor. The mining properties of the two old companies conveyed to the new company were not worth to exceed $50,000 cost, and were at the time of this scheme of consolidation considered and estimated as of the aggregate value of $100,000. The new and defendant company assumed payment of the indebtedness of the Minerva Mining Company to the plaintiff, which consented to a

novation of its debt, accepting the notes of the defendant company in place of those of the old Minerva Company. *This is the claim upon which this action is brought.* The court also finds "that the payees in said notes named, and the general managing officer of the plaintiff, well knew, at the time of the execution of said notes and of their indorsement and delivery to the plaintiff, all the facts hereinbefore stated, relating to the organization of the defendant corporation and the understanding and plan of its organization, and so dealt with the defendant knowing such matters, and were parties to and interested in the original scheme of the incorporation of the defendant company as in the findings set forth." This must be construed as meaning that the "general managing officer" referred to is the person who transacted the business with the defendant company in taking these notes, and of the benefit of whose action in that regard the plaintiff has availed itself. Notice to him must be deemed notice to the plaintiff.

Returning, now, to the subsequent management of the affairs of the defendant company, the board of directors, pursuant to the scheme of organization, offered for sale in the open market the 150,000 shares remaining in the treasury, as fully paid-up stock, and some of it was bought as such by the other defendants in good faith, for a price exceeding its fair market value, (but not exceeding one dollar per share,) believing it to be fully paid-up stock. This is called in the findings "Treasury Stock." The holders of the old company stock also placed their stock in the market, some of which the defendants also bought, under like circumstances and in the same belief. In March, 1887, the board of directors, pursuant to a resolution adopted by them, distributed *pro rata* among the individual shareholders all the stock remaining unsold in the treasury. Of this the individual defendants received their respective shares, for which they paid nothing. This is called in the findings "Pro rate Stock." The court also finds that none of such defendants ever contracted, promised, or in any manner

agreed, or intended to contract, promise, or agree, to pay, on account of such stock, any other or different or greater sum or consideration, unless the law would impose or imply such promise, contract, or agreement from the foregoing facts The holdings of the defendants consist, in part, of old company stock, in part of treasury stock, and in part of private stock.

The contention of the plaintiff is that the defendant shareholders are individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they have actually paid therefor, viz., nine dollars per share on the old company and treasury stock, for which they paid in value only one dollar per share, and ten dollars per share on the pro rate stock, for which they paid nothing. If these stockholders were indebted to the corporation for unpaid instalments on stock, this debt would be an asset of the corporation which, in case it became insolvent, any creditor might always enforce for the purpose of satisfying his claim. But it is very clear from the facts that the defendant company has no claim against the defendant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold, or given away, as fully paid stock, is entirely valid. But the plaintiff bases its claim upon the familiar doctrine that the capital stock of a corporation is a trust fund for the benefit of its creditors, and that, if shares are not in fact paid up, an arrangement between the corporation and the shareholders that they shall be deemed paid up, although valid between the company and the stockholder, will be ineffectual as to creditors, and that equity will hold the shareholder liable for the amount not in fact paid on his stock, to the extent necessary to satisfy the demands of creditors. We waive consideration of the question (which may, at least, admit of doubt) whether plaintiff's complaint is sufficient to entitle it to such relief. See *Phelan* v. *Hazard,* 5 Dill. 45; Cook, Stocks, § 47; *Scovill* v. *Thayer,* 105 U. S. 143.

The general proposition advanced by plaintiff cannot be

controverted, but the principle upon which this trust in favor of creditors rests and is administered must not be overlooked. The whole doctrine that the capital stock of corporations is a trust fiund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provisions for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist the rule itself ceases to apply. This trust does not arise absolutely in every case, in favor of every and any creditor. It is not true, and no case can be found which holds that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than that it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. For example, to distribute the capital among the shareholders without provision for paying corporate debts would be a fraud on existing creditors, as well as on such subsequent creditors as deal with the corporation in reliance upon the assumption that its professed capital remains intact. An illustration of this kind is to be found in the very first case in which what is now called the "American doctrine" was announced by Justice Story. We refer to the case of *Wood* v. *Dummer,* 3 Mason, 308, where a banking association distributed three-fourths of its capital among its shareholders without providing for the payment of billholders, and the court impressed a trust in their favor upon

the capital in the hands of the shareholders. So, again, where corporations have organized and engaged in business with a certain amount of ostensible and professed paid-up capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called "paid-up," and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital. To this class belong many of the cases cited by plaintiff, as, for example, *Sawyer* v. *Hoag,* 17 Wall. 610; *Wetherbee* v. *Baker,* 35 N. J. Eq. 501.

While the courts have not always had occasion to state the limitations upon the doctrine that "the capital is a trust fund for the benefit of creditors," yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders, it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors. If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets. *Coit*

v. *Gold Amalgamating Co.*, 14 Fed. Rep. 12, same case 119 U. S. 343, (7 Sup. Ct. Rep. 231.) This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors.

These views effectually dispose of the question of the liability of the defendants, at least on account of their old company and treasury stock. We think it also logically follows from what we have said that the defendants are not liable to the plaintiff upon their "pro rate" stock as for unpaid stock subscriptions. This stock had not been issued when plaintiff's debt was contracted. It could not have dealt with the company on the faith of any capital represented by these shares. In fact, it knew that no such capital had been paid in, unless the mining properties of the two old companies can be considered as represented in part by them; and the value of these properties remained the same, and they were equally available to creditors, whether represented by 100,000 shares or 250,000 shares of stock. Under such circumstances, the plaintiff has no equitable right to insist on the contribution of a greater amount of capital by the holders of these shares than the corporation itself could insist on. 2 Mor. Priv. Corp. §§ 832, 833.

Judgment affirmed.[2]

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[2] *For other cases in accord with the proposition that the creditor's knowledge that stock is not to be paid in full presents recovery,* see Thompson on Corporations, Edition of 1900, §5022. *Compare:* cases *ibid.*, §5028.

For cases holding that creditors who extended credit to the corporation prior to the issue of watered stock cannot recover from the holders of such stock, see Thompson on Corporations, Edition 1910, §5021, note 92.

Compare with our principal case: Easton National Bank v. *American Brick and Tile Co.*, 70 N. J. Eq. 732, 1905. (A statute provided that "where the whole capital of a corporation shall not have been paid

in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." A Company was organized and issued "full paid" stock, where this was not the case in fact, A received some of the stock and subsequently became a creditor of the Company. *Held*, that A was not debarred from participating as a creditor in proceedings taken to enforce the liability of delinquent creditors. Pitney, J.: "This brings us to a consideration of the grounds upon which the learned vice-chancellor denied the receiver's prayer for relief so far as the Green claims are concerned. There is a line of reported cases holding that stockholders who participate or aid in the issue of paid-up stock upon payment of less than its par value, or who have knowledge of the act and acquiesce therein, cannot afterwards complain of the transaction, either as stockholders or as creditors. Some of these are cited in *Cook Stock*, §39, referred to in the opinion of the vice-chancellor. Others will be cited below. So far as we have observed, however, all well-considered decisions that adopt this doctrine are based upon general principles of equity, in the absence of any controlling statute or public policy, resort being had alone to the 'trust fund theory' as a basis for the stockholder's liability to creditors. * * * But so far as this so-called 'trust fund doctrine' excludes any creditors from relief against the stockholders, it does so on the theory that the liability of the latter rests alone upon their having held out the capital of the company to persons extending credit to it as the source from which repayment might be expected. If this be the only foundation of the stockholder's liability, it is perhaps not irrational to debar creditors whose claims accrued prior to the stock issue in question, and subsequent creditors who had notice when they extended credit that the stock issue did not represent in whole or in part what it purported to represent—that is, an equivalent amount in value added to the assets of the company.

"But in this state the stockholders' liability to creditors does not depend alone or chiefly upon the theory of 'holding out.' It depends upon the stockholders voluntary acceptance, for consideration touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien, and which requires stock subscriptions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had notice and those who had none.")

HANDLEY *v.* STUTZ.

IN THE SUPREME COURT OF THE UNITED STATES, 1891.

139 United States Reports, 417.

The Clifton Coal Company at the time of its organization had a capital of $120,000, divided into shares of $100 each, with power to increase its capital to $200,000. Being led to believe that its coal would coke, and, therefore, its products could be profitably extended from grate and steam purposes to iron-making coke, and needing money to make the necessary changes in the plant, the Company decided to issue $50,000 worth of bonds, secured by a trust mortgage. Finding that the bonds were unsalable, the Company decided to increase its capital stock to $200,000, and offer to the purchasers of the bonds, as a bonus, an equal amount of the new stock. This plan was carried out, each purchaser of a $1,000 bond receiving ten shares of new stock, the receipts reciting that the stock "was issued with bonds for the same amount, as per agreement." The certificates, on their face, recited that the shares of stock were fully paid up "and were non-assessable."

The remaining $30,000 shares of increased stock, which were not needed to secure the subscribers to the bonds, appeared to have been distributed *pro rata* among the old stockholders. In the latter part of 1887, and in the early part of the following year, plaintiffs obtained judgments against the company, which were unsatisfied, and in September, 1887, by an order of the Circuit Court of Hopkins County, Kentucky, the entire property of the company was placed in the hands of a receiver, and its operations stopped.

On February 8, 1889, this bill was filed against the coal company and the holders of this increased stock, to compel payment therefor, and to recover the amounts of the judgments against the company. The court dismissed the bill as to three of the defendants not served with process, and as to

the rest held them liable to all the creditors of the company whose debts originated after the alleged increase of stock, and fixed May, 1886, as the date of such increase. As to debts contracted prior to that date, they were excluded because, as between the company and the stockholders, the latter held such stock properly, and without liability to the company, and all creditors who dealt with the company prior to such increase, and not upon the faith of such stock, had no equity to demand more than the company itself could. Five of the defendants against whom decrees were rendered in excess of $5000 appealed to this court, and the Circuit Court suspended the execution of the decree as to those who could not appeal, until this court should determine the rights of the appellants.

The opinion of the Circuit Court is reported in 41 Fed. Rep. 531.[1]

Mr. Justice Brown:[2] So far as the question of liability to the proposed assessments is concerned these defendants, with respect to their relations to this corporation, are divisible into two distinct classes: First, those of the original stockholders who received the $30,000 increased stock as a gift; second, those who subscribed to the $50,000 bonds, and received an equal amount of stock, as a bonus or inducement to make the subscription. * * *[3]

Somewhat different conditions apply to those who subscribed for the bonds of the company, with the understanding that they were to receive an amount of stock equal to the bonds as an additional inducement to their subscription. The facts connected with this transaction are substantially as follows: Some three years after the company was organized it

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[1] The facts are restated.

[2] The Court's discussion of certain questions pertaining to the action taken at the meeting of stockholders which authorized the increase is omitted.

[3] The Court's discussion of the liability of the original stockholders in so far as they had received part of the stock increase is omitted. The Court held that such stockholders were liable for the full value of the stock to creditors who had given credit to the Company after the increase.

became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success, owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig iron. To embark in this, however, money was needed, and as the stock of the company was not worth more than 50 cents on the dollar, it was evident this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of $50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and, acting upon the suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased 800 shares, 500 of which should be turned over to the subscribers to the bonds, as a bonus or an additional consideration. The evidence is uncontradicted that the bonds could not have been negotiated without the stock; that they were both sold as a whole; that the transaction was in good faith, and, considering the risk that was taken by the subscribers, the price paid for the stock and bonds was fair and reasonable. The directors appear to have done all in their power to obtain the best possible terms, and there is no imputation of unfair dealing on the part of any one connected with the transaction. At that time the mines and property of the company were in good condition, and the prospects of success were fair.

The case then resolves itself into the question whether an active corporation, or as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. The

question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point. In the *Upton Cases*, arising out of the failure of the Great Western Insurance Company; in *Hatch* v. *Dana*, 101 U. S. 205, and in *Hawkins* v. *Glenn*, 131 U. S. 319, the defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not as in this case to purchase property or raise money to add to the plant, and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In *County of Morgan* v. *Allen*, 103 U. S. 498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting

them upon the market for the best price that can be obtained; and so long as the transaction is *bona fide,* and not a mere cover for "watering" the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase.

Thus in *New Albany* v. *Burke*, 11 Wall. 96, a city subscribed to the stock of a railroad, and issued bonds for a part of the subscription, agreeing to issue them for the rest of it, when the road should be built to a certain point. The road relied mainly upon these bonds to raise the necessary money. The validity of the bonds being denied by taxpayers, who had filed bills to enjoin the raising of a tax to pay the interest, their value in the market was largely impaired, and it was found they could not be sold without a sacrifice. Under these circumstances the company applied to the city to pay a certain sum which had been borrowed by the road upon the pledge of the bonds already issued, with sundry other moneys, and in consideration thereof the city obtained from the company a large number of bonds which had not been negotiated, and a cancellation of the subscription. In a suit brought by a judgment creditor to enforce the original subscription, it was held that the compromise was legal, and the payment of such subscription would not be enforced, although it subsequently turned out that the bonds were worth more than they could have been sold for. Said Mr. Justice Strong, speaking for the court: "Had the company sold to a stranger, and then the city become a purchaser from the

stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchaser was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction . . . was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued and others of which it was under obligations to issue, at the call of the vendor. . . . Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. . . . We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market." * * *[4]

A case nearer in point is that of *Clark* v. *Beaver, ante,,* 96, decided at the present term of this court. In this case, a railroad company, of which defendant's intestate was president and stockholder, had a settlement with a construction company, of which defendant's intestate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it thirty-five hundred shares of its stock at 20 cents on the dollar, and the same were accepted in full satisfaction of the debt. The stock was not worth anything in the market, and was issued directly to the defendant's intestate. No other payment than the 20 per cent. was ever made on account of this stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim, upon the theory that he was liable for the actual par value of such stock, whatever may have

[4] The Court's examination of *Coit* v. *Gold Amalgamating Co., supra,* is omitted.

been its market value at the time it was received. It was held he could not recover. "Of course, under this view," says Mr. Justice Harlan, in delivering the opinion of the court, "every one having claims against the railway company—even laborers and employees—who could get nothing except stock in payment of their demands, became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although, at the time it was sought to make them liable, the corporation had ceased to exist, or its stock had remained, as it was when taken, absolutely worthless. . . . To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value—there being no statute forbidding such a transaction—without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property."

So in *Fogg* v. *Blair, ante,* 118, also decided at the present term, it was held to be competent for a railroad, exercising good faith, to use its bonds or stock in payment for the construction of its road, although it could not, as against creditors or stockholders, issue its stock as fully paid without getting some fair or reasonable equivalent for it. It was there said: "What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them." It appeared in that case that full and adequate compensation for the work done had been paid by the company in its mortgage bonds, and, as the bill contained no allegation whatever as to the real or market value of such stock, it was held that the contractors receiving this stock

were not liable to creditors for its par value. It was added: "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit on the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court—assuming such facts to be true—to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized." It would seem to follow from this that if the stock had been of some value, that value, however much less than par, would have been the limit of the holder's liability.

In *Morrow* v. *Nashville Iron and Steel Co.,* 87 Tennessee, 262, 275, 276, the Supreme Court of Tennessee held, that a contract with a subscriber to stock of a corporation, that for every share subscribed he should receive bonds to an equal amount, secured by mortgage on the company's plant, is void as against creditors, and also between the subscriber and the corporation. But the court drew a distinction between such a case and sales of or subscription to the stock of an organized and going corporation. It said: "The necessities of the business of an organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such cases, the question of fraud aside, a purchaser would only be held for his contract price." This case from Tennes-

see puts as an illustration the exact case with which we are now dealing.

The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained. *Stein* v. *Howard*, 65 California, 616. As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company. Our conclusion upon this branch of the case disposes of it as to those who were held liable by virtue of their subscription to the bonds. * * *[5]

Reversed and the cause remanded for further proceedings in accordance with this opinion.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Lamar, dissenting.

I dissent from the conclusion of the court in respect of the stock received by the subscribers to the bonds. That stock was not paid for in money or money's worth, or issued in payment of debts due from the company, or purchased at sale upon the market. It was a mere bonus, thrown in with

[5] The Court's discussion of the decision of the Circuit Judge that only subsequent creditors were entitled to enforce their claims against stockholders is omitted.

the bonds as furnishing the inducement to the bond subscription, of larger control over the corporation, and of possible gain without expenditure. Becoming secured creditors through the bonds, the subscribers increased their power through the stock. In my view, there was no actual payment for the stock, and to treat it as paid up, is to sanction an arrangement to relieve those who would reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure, of the enterprise.

When the capital stock of a corporation has become impaired, or the business in which it has engaged has proven so unremunerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk.

My brother LAMAR concurs with me in this dissent.[6]

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[6] *Compare with our principal case: Rickerson Roller-Mill Co.* v. *Farrell Foundry & Machine Co.*, 75 Fed. 554, 1896. (Judgment creditors bill. The corporation issued $100,000 stock for patent rights. To secure working capital, capital stock increased to $150,000. A agreed to take extra stock for $25,000. The stock was issued to A as full paid. B *et al.*, became creditors of the Company knowing the above facts. Lurton, J.: "The second defense is that this increase of stock was for the purpose of restoring the impaired capital of the Rickerson Roller-Mill Company; that the case was that of a going, active corporation, whose capital had become impaired, and whose stock was, on the market, worth only 50 cents on the dollar; and that, as the stock was actually sold in good faith for its actual market value, neither the corporation nor its creditors are injured, and neither can call upon such a purchaser for the difference between the sum actually paid and the par of the stock. For this counsel cite *Handley* v. *Stutz*, 139 U. S. 417, 11 Sup. Ct. 530; *Clark* v. *Bever*, 139 U. S. 96, 11 Sup. Ct. 468; *Fogg* v. *Blair*, 139 U. S. 118, 11 Sup. Ct. 476; *Morrow* v. *Steel Co.*, 87 Tenn. 262, 10 S. W. 495; *Young* v. *Iron Co.*, 65 Mich. 111, 31 N. W. 814. Were the circumstances such as to enable a purchaser of these increased shares to buy them from the company at less than their par value without incurring a liability to the creditors for the difference between the par of the stock and the price actually paid? The case for decision certainly differs most materially from *Clark* v. *Bever* and *Fogg* v. *Blair*. These shares were not, as in those cases, the shares of an insolvent corporation, received by a creditor, in payment and discharge of his debt, at less than par, and at a value in excess of the actual market value. In neither of the cases above referred to was the stock taken in any sense as an investment, or for the purpose of enabling the company to enlarge or increase its business, but was accepted by the creditor, in each instance, as the best settlement obtainable from an insolvent corporation. Neither is this the case of a going corporation, whose capital stock had become impaired or diminished by losses or misfortunes. It is true that in some sense this corporation had been doing business in a small way for a month or more before this

new stock was issued, but there is no evidence that its capital stock had been impaired by losses. Upon the contrary, the Messrs. Fox were admitted as shareholders in consequence of the necessity for increasing the capital stock of the company, and enabling it to begin the business for which it had been organized. Their purchase of these shares was in accordance with the original scheme of the promoters, and they were bought as an investment in a manufacturing corporation which had not yet acquired a plant, or begun the business for which it had been organized. The arrangement by which they were to buy these shares from the corporation, and pay but 50 per cent. of the par value of the stock, was subject to the contingency that they would be liable, in the event of the insolvency of the corporation, to creditors who should become such in ignorance of the arrangement, and who had a right to suppose that this increased stock had been paid in full, or was subject to call." The Court *held* that the plaintiff's knowledge of the circumstances under which A received the stock, in the absence of any statutory or charter provisions that stock should be paid for in full, barred their right to recover.)

See v. *Heppenheimer*, 69 N. J. Eq. 36, 1905. (C, *et al.*, subscribed to the bonds of A Company, and received with each bond a bonus of stock. *Held*, that the fact that they did not pay for the stock was sufficient to put C, *et al.*, on notice that the stock had not been paid for either in cash or property, and that C, *et al.*, were liable to the Company's creditors thereon.)

Key Number of Amer. Digest, in re *liability of holders of "bonus" stock or stock issued as a gratuity*, Corporations, 243 (6).

HOSPES *v.* NORTHWESTERN MANUFACTURING AND CAR CO..

IN THE SUPREME COURT OF MINNESOTA.

48 Minnesota Reports, 174.[1]

MITCHELL, J. This appeal is from an order overruling a demurrer to the so-called "supplemental complaint" of the Minnesota Thresher Manufacturing Company. The North-Western Manufacturing & Car Company was a manufacturing corporation organized in May, 1882. Upon the complaint of a judgment creditor, Hospes & Co., after return of execution unsatisfied, judgment was rendered in May, 1884, sequestrating all its property, things in action, and effects, and appointing a receiver of the same. This receivership still continues, the affairs of the corporation being not yet fully administered; but it appears that it is hopelessly insolvent, and that all the assets that have come into the hands of the receiver will not be sufficient to pay any considerable part of the debts. The Minnesota Thresher Manufacturing Company, a corporation organized in November, 1884, as creditor, became a party to the sequestration proceeding, and proved its claims against the insolvent corporation. In October, 1889, in behalf of itself and all other creditors who have exhibited their claims, it filed this complaint against certain stockholders (these appellants) of the car company, in pursuance of an order of court allowing it to do so, and requiring those thus impleaded to appear and answer the complaint. The object is to recover from these stockholders the amount of certain stock held by them, but alleged never to have been paid for. What was said in *Meagher's Case, ante,* p. 158, N. W. Rep. 1114 (just decided), is equally applicable here as to the right to enforce such a liability in the sequestration proceeding upon the

[1] The Reporter's statement of the facts of the case and his notes of the argument of cases are omitted.

petition or complaint of creditors who have become parties to it. There is nothing in this practice inconsistent with what was decided in *Minnesota Thresher Mfg. Co.* v. *Langdon*, 44 Minn. 37, (46 N. W. Rep. 310). The complaint is not the commencement of an independent action by creditors in their own behalf, antagonistic to the rights of the receiver, but is filed in the sequestration proceeding itself, and in aid of it.

The principal question in the case is whether the complaint states facts showing that the thresher company, as creditor, is entitled to the relief prayed for; or, in other words, states a cause of action. Briefly stated, the allegations of the complaint are that on May 10, 1882, Seymour, Sabin & Co. owned property of the value of several million dollars, and a business then supposed to be profitable. That, in order to continue and enlarge this business, the parties interested in Seymour, Sabin & Co., with others, organized the car company, to which was sold the greater part of the assets of Seymour, Sabin & Co. at a valuation of $2,267,000, in payment of which there were issued to Seymour, Sabin & Co. shares of the preferred stock of the car company of the par value of $2,267,000, it being then and there agreed by both parties that this stock was in full payment of the property thus purchased. It is further allaged that the stockholders of Seymour, Sabin & Co., and the other persons who had agreed to become stockholders in the car company, were then desirous of issuing to themselves, and obtaining for their own benefit, a large amount of common stock of the car company, "without paying therefor, and without incurring any liability thereon or to pay therefor;" and for that purpose, and "in order to evade and set at naught the laws of this State," they caused Seymour, Sabin & Co. to subscribe for and agree to take common stock of the car company of the par value of $1,500,000. That Seymour, Sabin & Co. thereupon subscribed for that amount of the common stock, but never paid therefor any consideration whatever, either in money or property. That thereafter these persons caused

this stock to be issued to D. M. Sabin as trustee, to be by him distributed among them. That it was so distributed without receipt by him or the car company, from any one, of any consideration whatever, but was given by the car company and received by these parties entirely "gratuitously." The car company was, at this time, free from debt, but afterwards became indebted to various persons for about $3,000,000. The thresher company, incorporated after the insolvency and receivership of the car company, for the purpose of securing possession of its assets, property, and business, and therewith engaging in and continuing the same kind of manufacturing, prior to October 27, 1887, purchased and became the owner of unsecured claims against the car company, "*bona fide*, and for a valuable consideration," to the aggregate amount of $1,703,000. As creditor, standing on the purchase of these debts, which were contracted after the issue of this "bonus" stock, the thresher company files this complaint to recover the par value of the stock as never having been paid for. The complaint does not allege what the consideration of these debts was, nor to whom originally owing, nor what the intervener paid for them, nor whether any of the original creditors trusted the car company on the faith of the bonus stock having been paid for. Neither does it allege that either the thresher company or its assignors were ignorant of the bonus issue of stock, nor that they or any of them were deceived or damaged in fact by such issue, nor that the bonus stock was of any value. Neither is there any traversable allegation of any actual fraud or intent to deceive or injure creditors. A desire to get something without paying for it, and actually getting it, is not fraudulent or unlawful if the donor consents, and no one else is injured by it; and the general allegation that it was done "in order to evade and set at naught the laws of the State" of itself amounts to nothing but a mere conclusion of law. As a creditors' bill, in the ordinary sense, the complaint is manifestly insufficient. The thresher company, however, plants itself upon the so-called "trust-fund" doctrine, that the

capital stock of a corporation is a trust fund for the payment of its debts; its contention being that such a "bonus" issue of stock creates, in case of the subsequent insolvency of the corporation, a liability on part of the stockholder in favor of creditors to pay for it, notwithstanding his contract with the corporation to the contrary.

This "trust-fund" doctrine, commonly called the "American doctrine," has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood* v. *Dummer,* 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two-thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding bill holders. Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders,—a proposition that is sound upon the plainest principles of common honesty. In *Fogg* v. *Blair,* 133 U. S. 534, 541 (10 Sup. Ct. Rep. 338), it is said that this is all the doctrine means. The expression used in *Wood* v. *Dummer* has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust,* has the beneficial interest. Absolute control and

power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further. This is well illustrated and clearly announced in the case of *Graham* v. *La Crosse & M. R. Co.*, 102 U. S. 148. That was a creditors' suit to reach a piece of real estate on the ground that it had been conveyed by the corporation fraudulently for a wholly inadequate consideration. The trust-fund doctrine was invoked by a subsequent creditor, and it was claimed that, as the trust had been violated, the deed should be set aside. If the premise was correct that the corporation held it in trust for creditors, the conclusion was inevitable; but the court denied the premise, saying that a corporation is in law as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same; and that there is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors any more than a like proposal by an individual; that the same principles of law apply to each. That the phrase that "the capital of a corporation is a trust fund for the payment of its creditors" is misleading, if not inaccurate, is illustrated by the character of the actions that are frequently mistakenly instituted on the strength of it. For example, in the case of *Wabash, etc., R. Co.* v. *Ham*, 114 U. S. 587 (5 Sup. Ct. Rep. 1081), two roads had been consolidated, the new company acquiring the property of the old ones. A creditor of one of the old companies, on the strength of the "trust-fund" doctrine, claimed a lien on its property in the hands of the new corporation. If this property was impressed with a trust in favor of creditors in the hands of the old company, it would logically follow that it would continue so in the hands of the new one.

But the court denied the relief, and, in giving its construction of the "trust-fund" doctrine, said: "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void." This is probably what is meant when it is said in some cases, as in *Clark* v. *Bever,* 139 U. S. 96, 110 (11 Sup. Ct. Rep. 468), that the capital of a corporation is a trust fund *sub modo.* If so, no one will dispute it. But it means very little, for the same thing could be truthfully said of the property of an individual or a partnership. And obviously it would make no difference whether the disposition of the corporate property is to a stranger or to a stockholder, except that, of course, the latter could not be an innocent purchaser.

There is also much confusion in regard to what the "trust-fund" doctrine applies. Some cases seem to hold that unpaid subscribed capital is a trust fund, while other assets are not,—that is, so long as the subscription is unpaid, it is held in trust by the corporation, but, when once paid in, it ceases to be a trust fund; while other cases hold that, paid or unpaid, it is all a trust fund. The first seems to be the rule laid down in *Sawyer* v. *Hoag,* 17 Wall. 610, in which the "trust-fund" doctrine was first squarely announced by that court with all the vigor and force characteristic of the great jurist who wrote the opinion. In that case a stockholder in an insurance company had given his note, as the court found the fact to be, for 85 per cent. of his subscription to the stock of the company. After the company had become bankrupt, and the stockholder knew the fact, he bought up a claim against the company for one-third its face, and in a suit by the assignee in bankruptcy on his note

set up this claim as an off-set. That this would have been a fraud on the bankrupt act, and at least a moral fraud on policy holders, is quite apparent without invoking the "trust-fund" doctrine; and, if the note for unpaid stock was a trust fund, there could have been no offset, whether the company was solvent or insolvent. In the opinion it is said that, if the subscription had been paid by the note or otherwise, the note ceased thereby to be a trust fund to which creditors can look, and becomes ordinary assets, with which directors may deal as they choose. But in *Upton* v. *Tribilcock*, 91 U. S. 45, it is stated: "The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away." While in *Sanger* v. *Upton*, Id. 56, it is said: "When debts are incurred a contract arises with the creditors that it [the capital] shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied." And in the same connection it is distinctly stated that there is no difference between assets paid in and subscriptions; that "unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. *As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation.*" This language is quoted and approved in *County of Morgan* v. *Allen*, 103 U. S. 498, 508. It would seem clear that this is the correct statement of the law. The capital (not the mere share certificates) means all the assets, however invested. If a subscriber gives his note for his stock, that note is no more and no less a trust fund than the money would have been if he had paid cash down. Capital cannot change from a trust to not a trust by a mere change of form. It is either all a trust or all not a trust, and the "trust-fund" rule, whatever that be, must apply to all alike, and in the same way. If the assets of a corporation are given back to

stockholders, the result is the same as if the shares had been issued wholly or partly as a bonus. The latter is merely a *supra,* to the proposition that the complaint should have the capital, voluntary conveyances, stock paid in overvalued property; all are forms of one and the same thing, all reaching the same result (a disposition of corporate assets), which may or may not be a fraud on creditors, depending on circumstances. This much being once settled, the solution of the question when a subsequent creditor can insist on payment of stock issued as paid up, but not in fact paid for, or not paid for at par, becomes, as we shall presently see, comparatively simple.

Another proposition which we think must be sound is that creditors cannot recover on the ground of contract when the corporation could not. Their right to recover in such cases must rest on the ground that the assets of the stockholders with reference to the corporate capital constitutes a fraud on their rights. We have here a case where the contract between the corporation and the takers of the shares was specific that the shares should not be paid for. Therefore, unlike many of the cases cited, there is no ground for implying a promise to pay for them. The parties have explicitly agreed that there shall be no such implication, by agreeing that the stock shall not be paid for. In such a case the creditors undoubtedly may have rights superior to the corporation, but these rights cannot rest on the implication that the shareholder agreed to do something directly contrary to his real agreement, but must be based on tort or fraud, actual or presumed. In England, since the Act of 1867, there is an implied contract created by statute that "every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for every one would be advised of its provisions, and could conduct himself accordingly. And in view of the fact that "watered" and "bonus" stock

is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the legislature, and not for the courts. We have no such statute; and, even if the law of 1873, under which the car company was organized, impliedly forbids the issue of stock not paid for, the result might be that such issue would be void as *ultra vires,* and might be canceled, but such a prohibition would not of itself be sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock.

It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of "bonus" stock pay for it contrary to his actual contract with the corporation. Thus no such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock. *First Nat. Bank* v. *Gustin, etc., Mining Co.,* 42 Minn. 327 (44 N. W. Rep. 198); *Coit* v. *Gold Amalgamating Co.,* 119 U. S. 343 (7 Sup. Ct. Rep. 231); *Handley* v. *Stutz,* 139 U. S. 417, 435 (11 Sup. Ct. Rep. 530). It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the "bonus" stock was issued, for a man cannot be defrauded by that which he knows when he acts. *First Nat. Bank* v. *Gustin, etc., Mining Co., supra.* It has also been held not to exist where stock has been issued and turned out at its full market value to pay corporate debts. *Clark* v. *Bever, supra.* The same has been held to be the case where an active corporation, whose original capital has been impaired, for the purpose of recuperating itself issues new stock, and sells it on the market for the best price obtainable, but for less than par (*Handley* v. *Stutz, supra*); although it is difficult to perceive, in the absence of a statute authorizing such a thing (of which every one dealing with the corporations is bound to take notice), any difference between the original stock of a new corporation and addi-

tional stock issued by a "going concern." It is difficult, if not impossible, to explain or reconcile these cases upon the "trust-fund" doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of "bonus" stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the "trust-fund" doctrine has involved it; and we think that, even when the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule.

It is urged, however, that, if fraud be the basis of the stockholders' liability in such cases, the creditor should af-

firmatively allege that he believed that the bonus stock had been paid for, and represented so much actual capital, and that he gave credit to the corporation on the faith of it; and it is also argued that, while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and that in pleadings no presumptions of fact are indulged in. This position is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon, the amount of its professed and supposed capital, and every one who deals with it does so upon the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital, and in a majority of cases knows nothing about the shares of stock held by any particular stockholder, or, if so, what was paid for them. Hence, in a suit by such creditor against the holders of "bonus" stock, he could not truthfully allege, and could not affirmatively prove, that he believed that the defendants' stock had been paid for, and that he gave the corporation credit on the faith of it, although, as a matter of fact, he actually gave the credit on the faith of the financial standing of the corporation, which was based upon its apparent and professed amount of capital. The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; and that, if the fact was that he dealt with the corporation with knowledge of the arrangement by which the "bonus" stock was issued, this is a matter of defense. *Gogebic Inv. Co.* v. *Iron Chief, Min. Co.*, 78 Wis.

427 (47 N. W. Rep. 726). Counsel cites *Fogg* v. *Blair, supra,* to the proposition that the complainant should have stated that this stock had some value; but that case is not in point, for the plaintiff there was a prior creditor; and, as his debt could not have been contracted on the faith of stock not then issued, he could only maintain his action, if at all, by alleging that the corporation parted with something of value.

In one respect, however, we think the complaint is clearly insufficient. The thresher company is here asking the interposition of the court to aid in enforcing an equity in favor of creditors against the stockholders by declaring them liable to pay for this stock contrary to their actual contract with the corporation. While the proceeding is not, strictly speaking, an equitable action, yet the relief asked is equitable in its nature. Under such circumstances, it was incumbent upon the thresher company to show its own equities, and that it was in a position to demand such relief. It was not the original creditor of the car company, but the assignee of the original creditors. By that purchase it, of course, succeeded to whatever strictly legal rights its assignors had; but it is not rights of that kind which it is here seeking to enforce. Under such circumstances, we think it was incumbent upon it to state what it paid for the claims, or at least to show that it paid a substantial, and not a mere nominal consideration. The only allegation is that it paid "a valuable consideration." This might have been only one dollar. It appears that it bought the claims after the car company had become insolvent, and its affairs were in the hands of a receiver; also that the indebtedness of that company amounted to about $3,000,000, and that there were not corporate assets enough to pay any considerable part of it. The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insolvent corporation. If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the

purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for. It would say to them, "We will not create and enforce an equity for the benefit of any such speculation." Counsel for respondent suggest that the thresher company is but an organization of the original creditors, who formed it, and pooled their claims, so as to save something out of the wreck of the car company; but nothing of the kind is alleged. On this ground the demurrer should have been sustained. * * *[2]

Order reversed.

GILFILLAN, C. J., took no part.

(Opinion published 50 N. W. Rep. 1117.)

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[2] The Court's discussion of the statute of limitations is omitted.

CHRISMAN-SAWYER BANKING CO.
v.
INDEPENDENCE WOOL MANUFACTURING CO.

IN THE SUPREME COURT OF MISSOURI, 1902.

168 *Missouri Reports*, 634.

John McCoy subscribed for fifty shares of stock of the Independence Wool Manufacturing Co. The Company announced that its stock was fully paid up in cash. This statement was not true. The Company, with the consent of all the stockholders, without receiving any consideration, released McCoy from his subscription. Subsequently the Chrisman-Sawyer Banking Co. became creditors of the Independence Company. There was no evidence that the Bank or their assignee, one Simpson, knew of the transaction of the Independence Company and McCoy *in re* the fifty shares. The assets of the Independence Company being exhausted, Simpson seeks to recover from McCoy the sum of $5000, as the unpaid subscription for the fifty shares of stock.[1]

MARSHALL, J.: The first question that is presented is, whether a subscriber to stock in an incorporated company, that has not been fully paid up, can, by any device or arrangement with the company, its officers or all of the other stockholders, surrender his stock to the company and be released from all liability for the amount remaining unpaid on such stock, and thereby be relieved of all responsibility on account of such stock to existing or subsequent creditors of the company.

It is conceded by all text-writers and adjudications and by the plaintiffs herein, that such a subscriber can not be so released as to existing creditors, without their consent. But it is claimed by the defendants that subsequently creditors

[1] The facts of the case are restated, only so much of the facts being given as bears on the part of the opinion republished.

can not complain or object, because when they gave credit to the company such unpaid subscription did not constitute an asset of the company, and in support of this contention the defendants cite Erskine *v.* Peck, 13 Mo. App. 280, affirmed by this court in 83 Mo. 465; Johnson *v.* Lullman, 15 Mo. App. 55, affirmed by this court in 88 Mo. 567; Hill *v.* Mining Co., 124 Mo. 167; 1 Beach on Private Corp., secs. 101 and 113; Cook on Stocks and Stockholders, sec. 168; and cases in other jurisdictions, including Morgan *v.* Lewis, 46 Ohio St. 1; Ins. Co. *v.* Swigert, 135 Ills. 162; Dunn *v.* Howe, 96 Fed. Rep. 163; Graham *v.* Railroad, 102 U. S. 148; Trust Co. *v.* Abbott, 162 Mass. 148; Steacy *v.* Railroad, 5 Dillon 348.

Beach on Private Corporations, vol. 1, sec. 113, states this to be the law, and in support of the statement that subsequent creditors have no right to complain, the author cites Hollingshead *v.* Woodward, 35 Hun 410; Johnson *v.* Lullman, 15 Mo. App. 55, and Erskine *v.* Peck, 13 Mo. App. 280. And this statement and this section of Beach on Private Corporations is cited, in Hill *v.* Mining Co., 124 Mo. l. c. 167, as authority for that doctrine.

Thus it will be seen that Beach relies principally on the St. Louis Court of Appeals, and on this court, in Erskine *v.* Peck and Johnson *v.* Lullman, as his authority for so stating the doctrine, and afterwards in Hill *v.* Mining Co., this court relies on Beach as authority for the doctrine.

In Hollingshead *v.* Woodward, 35 Hun 410, it appeared that the company had issued to the defendant twenty-five shares of stock as a stock dividend based upon surplus profits. Afterwards this was cancelled before the plaintiff became a creditor. It was held that the defendant was not liable.

In Graham *v.* Railroad, 102 U. S. 148, it was held that: "Where a corporation, solvent at the time, and having no actual intent to defraud creditors, disposes of its *lands* for an inadequate consideration or by a voluntary conveyance, its subsequent creditors can not question the transaction."

In Morgan *v.* Lewis, 46 Ohio St. 1, the defendant sold a furnace to the company and took pay therefor in stock of the company. The company became dissatisfied with the furnace, and the sale was rescinded, the company giving back the furnace and taking back the stock. It was held to be a good defense as against a claim by subsequent creditors for unpaid subscriptions on the stock.

In Insurance Co. *v.* Swigert, 135 Ills. 162, the question was the power of a receiver of a corporation to sue for unpaid subscriptions on stock where the stockholder by arrangement with the company had surrendered his stock and been released. It was held that as the company could not maintain such an action, the receiver (who was held to have no more power, under the law applicable to such cases in Illinois, than a voluntary assignee would have here) could not do so. The rights of creditors were not properly before the court, and, hence, it was only stated, at page 163 of the opinion, that such a surrender was fraudulent as to existing creditors, but that as between the surrendering stockholder and the company there was no longer any indebtedness on account of subscriptions for stock.

Trust Co. *v.* Abbott, 162 Mass. 148, was a bill against the executor of a deceased stockholder to compel specific performance of a contract of the deceased stockholder that upon his death the stock should be appraised and sold to the company. The questions involved in this case were not present in that case at all.

In Dunn *v.* Howe, 96 Fed. Rep. 160, it was held that under the statutes of Maine an assignee of an insolvent corporation can sue stockholders for unpaid subscriptions on stock. The questions under consideration in the case at bar were not present in that case, and what is therein said about "treasury stock," must be read in the light of the case in judgment.

On the other hand, it is contended by the plaintiff herein that neither the corporation, its officers nor stockholders have any power to agree with a subscriber for stock

that his subscription be cancelled, unless such power is expressly given to them by charter or statute, and that unpaid stock subscriptions constitute assets of the corporation which all creditors, existing or subsequent to the time of such attempted cancellation, have a right to look to for the payment of their debts, and that this right exists whether the creditor knew the fact that there were any such unpaid stock subscriptions when he extended credit to the company or not, the only exceptions to this rule being the right of the company to protect itself by forfeiting stock where the subscriber fails to pay for it, and in cases of a dispute between the company and the stockholder as to his liability, the matter may be compromised and the stock surrendered, if done in good faith. As to such exceptions, see Morawetz on Priv. Cor. p., secs. 125 and 114, and 2 Thompson on Law of Corp., sec. 1553, and see also sec. 961. Revised Statutes 1899, which provides substantially the same thing. In support of the general rule stated, the plaintiff aptly cites the following authorities: 1 Morawetz on Private Corporations, sec. 109, et seq; 2 Ibid., sec. 824, et seq.; 2 Thompson's Com. on Law of Corporations, sec. 1151, et seq.; Insurance Co. *v.* Floyd, 74 Mo. 286; Nichols *v.* Stevens, 123 Mo. 96; Ollesheimer *v.* Mfg. Co., 44 Mo. App. 172; Wells & Co. *v.* Thompson Mfg. Co., 54 Mo. App. 41; Shickle *v.* Watts, 94 Mo. 410; Rawhide Co. *v.* Hill, 72 Mo. App. 142; Skrainka *v.* Allen, 7 Mo. App. 434; s. c., 76 Mo. 384; Gill *v.* Balis, 72 Mo. 424; Ramsey *v.* Mfg. Co., 116 Mo. 313; State ex rel. *v.* McGrath, 86 Mo. 239; Thompson *v.* Lake, 19 Nev. 103; Hamor *v.* Eng. Co., 84 Fed. 392; Putnam *v.* Hutchison 45 Pac. Rep. 931; s. c., 4 Kans. App. 273; Allibone *v.* Hager, 46 Pa. St. 48; Railroad *v.* Bowser, 48 Pa. St. 29; Alling *v.* Wenzel, 133 Ill. 264; Singer *v.* Given, 61 Iowa 93; Railroad *v.* Eastman, 34 N. H. 140; Upton *v.* Tribilcock, 91 U. S. 45; Crandall *v.* Lincoln, 52 Conn. 73.

To these cases it is only necessary to add Camden *v.* Stuart, 144 U. S. 1. c. 113-114, and Van Cleve *v.* Berkey, 143 Mo. 109.

In the case last cited, BRACE, J., speaking for this court, in an elaborate and exhaustive opinion, reviewed the cases in this State and in other jurisdictions, and concluded as follows:

"Upon a review of all the cases decided by the appellate courts of this State since the adoption of the Constitution of 1875, the ruling in all of which will be found to be in harmony, it is impossible to escape the conviction that in this State, whatever may be the case in some of the other States, the American Trust Doctrine, as suggested by Mr. Justice HARLAN, has indeed been 'reinforced' by its Constitution and statutes; and that the proposition that the stock of a corporation must be paid for 'in meal or in malt,' in money or in money's value, is not a mere figure of speech, but really has the significance of its terms. It may be paid for in property, but in such case the property must be the fair equivalent in value to the par value of the stock issued therefor; that it is the duty of the stockholders to see that it possesses such value; that when a corporation is sent forth into the commercial world, accredited by them as possessed of a capital in money, or its equivalent, in property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid and that the money or its equivalent in property will be forthcoming to respond to his legitimate demands. In short, that it is the duty of the stockholder, and not of the creditor, to see that it is so paid; hence, the inquiry in a case between the creditor and a stockholder when property has been paid in for the capital stock of a corporation, is not whether the stockholder believed or had reason to believe that the property was equal in value to the par value of the capital stock; but whether, in point of fact, it was such equivalent."

In the opinion just referred to, the cases of Insurance

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[3] The rest of the opinion, dealing with a question under the Missouri statute of limitations and with whether Simpson was a *bona fide* holder of the claim, is omitted.

Co. *v.* Floyd, 74 Mo. 286; Gill *v.* Balis, 72 Mo. 424; Ramsey *v.* Mfg. Co., 116 Mo. 313, and Upton *v.* Tribilcock, 91 U. S. 45, which hold that a corporation can not make an arrangement with any of its stockholders by which they are to be released from the payment of their stock subscribed, or any part thereof, so as to affect the rights of the creditors, are cited, followed, approved and that doctrine firmly restated. The cases of Erskine *v.* Peck and Johnson *v.* Lullman, were distinguished in the Upton case, supra, and overruled as far as it was possible for that court to do so, and the contrary doctrine announced by the St. Louis Court of Appeals in Ollesheimer *v.* Mfg. Co., 44 Mo. App. 172, and in Wells & Co. *v.* Thompson Mfg. Co., 54 M. App. 41, was approved.

So that the law is now well settled in Missouri, as well as by the weight of authority in America, that unpaid stock subscriptions constitute an asset of an incorporated company, which all creditors, without regard to when their debts were contracted, have a right to look to and which can not be extinguished, released, given away, wiped out or impaired by any act of the corporation or the stockholder to the injury of the creditor except by his consent.

This is not only the legal rule but it conforms also to the demands of business integrity and honesty and is the logical sequence of the voluntary act of the stockholder flowing from his subscription. The statutes of this State authorize the formation of a business corporation—such as this company—only upon condition that all of the stock has been bona fide subscribed and that at least fifty per cent thereof has been paid up in lawful money of the United States (or in its equivalent). This is the statement and representation that is held out to the world by the incorporators, and their transferees, of every incorporated company. If the incorporators or stockholders could be allowed, as soon as the incorporation was completed, to sell out their stock to the company, and thereby escape liability for unpaid subscriptions, or in case the stock was fully paid, to receive back

from the company the amount paid in, and to turn back to the company the stock subscribed, the doors for great frauds upon the creditors would be thrown wide open, and the consequences would not only be disastrous to creditors, but would also be fatal to the corporations themselves, inasmuch as no one would deal with corporations under such conditions.

The statutes afford ample, honest and sufficient methods for reducing the stock of an incorporated company, and the rights of creditors as well as the interests of such companies are fully protected. Such a proceeding as was resorted to in this case is wholly without legal authority or protection. Either the whole stock was only paid up to the extent of eighty per cent, or else there were one hundred shares subscribed for (of which the defendant McCoy had fifty) upon which not one cent was paid to the company by the subscribers, and for which the company paid the subscribers not one cent when it resolved to buy them back at one hundred dollars a share, and to make them "treasury stock."

The parties have treated these shares as absolutely unpaid shares, and they can not complain if the consequences of such a position are visited upon them. It is a legal solecism to say that any business corporation, under our law, can become the owner of shares in such corporation, which are wholly unpaid for. At least fifty per cent was paid thereon before the company was incorporated, or else the incorporators did not tell the truth, and the incorporation was a fraud upon the State. But it has passed into a legal truism in Missouri that so far as creditors are concerned, unpaid stock subscriptions constitute an asset of the corporation that can be subjected to the payment of the debts of the corporation. The American doctrine is that such unpaid stock subscriptions constitute, in equity, a trust fund in the hands of the directors of the corporation for the payment of debts. Strictly and technically, of course such unpaid subscriptions are not a *trust fund,* but are rather an *asset*

of the corporation which it would be a fraud upon the creditors for the directors to dispose of in any manner or for any purpose except for the payment of the debts of the corporation. And this being true the courts will undo the fraudulent transfer and gather in the asset for the benefit of the creditors.

From these considerations it follows that the instruetion given by the court to the effect that if the stock subscription sued on was cancelled and surrendered by the defendant with the consent of all the stockholders of the company prior to the time the debt in suit was contracted, the plaintiff can not recover, was erroneous, and that on the contrary the defendant is liable to the creditors of the company, without regard to when their debts were contracted, for the unpaid subscription for such stock, and that the attempted surrender and cancellation of the subscription and the purchase of such stock by the company as "treasury stock," is void, and of no more effect than if no such thing had ever been attempted, and that the plaintiff is entitled to a judgment unless some of the other defenses are well founded.[2]

Affirmed.[3]

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[2] The rest of the opinion dealing with a question under the Missouri statute of limitations is omitted.

[3] *Compare: Hill* v. *Silvey*, 81 Ga. 500, 1888. (The charter of a bank provided the sum of $200,000 as the minimum amount of capital which would authorize it to do business, and that subscribers for stock should be liable for the debts of the bank to the extent of the unpaid stock subscribed for by them, in proportion to the number of shares held by them. There was a stock subscription list amounting to $408,200, and an organization of the bank in which 2,400 shares of stock were represented. In pursuance of regular calls, the subscribers represented in the organization paid fifty per cent. on their subscribed stock. On June 30, 1873, a return was made to the governor, under section 1467 of the code, representing the capital stock paid in as $140,340, and containing no statement of the capital stock subscribed. No action was taken definitely fixing any amount as the capital stock, until January, 1874, when the stockholders, by resolution, declared that it was thought best to reduce the stock to full paid up stock, that certificates of stock be issued for the amount actually paid in, and that the capital stock and subscriptions be reduced to the amounts actually paid in; providing further that the books should be opened for additional subscriptions of full paid up stock, to remain open until the whole capital stock subscribed should reach the sum of $400,000. No certificates of stock were issued until after this action. Other returns to the governor were made from year to year, showing the amount of capital stock as gradually increasing to $186,300, then decreasing to $160,000 on December 31, 1880, when the last return was made. The bank, becoming insolvent in 1881, made an assignment of all its property, rights,

etc., for the benefit of its creditors. Under a bill filed by the State of Georgia in behalf of itself and other creditors, the assignees were appointed receivers of all the property, etc., assigned to them. They brought a bill against the stockholders to collect the remaining fifty per cent. on their subscriptions, alleging that the resolutions above referred to were void, and that the unpaid fifty per cent. were assets of the bank which passed by the deed of assignment, and were a fund in equity to be collected and applied to the payment of the bank's debts." Bill dismissed. Gustis, J.: "In later years, another class of cases has arisen in which, after the capital stock has been subscribed, the fund representing it has been reduced by arrangements among the stockholders, either to treat the whole subscription as paid, when part only has been, to reduce the capital stock after subscription, or other agreements of like character; and the question has arisen in these cases whether as to future creditors the same absolute liability attaches, or whether certain qualifications are to be made according to the circumstances of each case. * * * It must be apparent that the stock as originally shown by the subscription list, was never held out to the world as the stock of the corporation, and that the creditors did not rely nor will they be legally presumed to have relied thereon. No creditor has by any pleadings or evidence sought to set up any such claim; they rest on the naked fact that the subscription was made. To the extent of the two hundred thousand dollars, the minimum capital stock allowed by the charter upon which business could be commenced, they certainly had a right to presume that the stock had been subscribed; the fact alone of the commencement of business created that presumption, and to that extent we have no doubt that the stockholders were correctly held liable. But beyond that amount no such presumption arises. No act, no statement of the corporation, is shown by which it has ever in any manner sought to mislead the public as to the real amount of its capital stock.")

APPENDIX A.

PENNSYLVANIA LEGISLATURE ON ASSOCIATIONS.

SECTION 1. — ASSOCIATIONS ORGANIZED ON THE NON-REPRESENTATIVE PRINCIPLE.

LIMITED PARTNERSHIPS.

ACT OF MARCH 21, 1836.[1]

SECTION 1. Limited partnerships for the transaction of any agricultural, mercantile, mechanical, mining and transporting of coal, or manufacturing business, within this state, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this act shall not be construed to authorize any such partnership for the purpose of banking or making insurance.

SECTION 2. Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute in actual cash payments,[2] a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital.

SECTION 3. The general partners only shall be authorized to transact business and sign for the partnership, and to bind the same.

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[1] P. L. 143.

[2] These payments may now be made in goods or merchandise. See Act of 1865, *infra*, page 8.

SECTION 4. The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain:—

I. The name or firm under which such partnership is to be conducted.

II. The general nature of the business intended to be transacted.

III. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners,[3] and their respective places of residence.

IV. The amount of capital which each special partner shall have contributed to the common stock.

V. The period at which the partnership is to commence, and the period at which it will terminate.

SECTION 5. The certificate shall be acknowledged by the several persons signing the same, in the manner, and before the same persons, that deeds are now acknowledged, and the said acknowledgment shall be certified in the same manner as the acknowledgment of deeds are now certified.

SECTION 6. The certificate so acknowledged and certified, shall be recorded and filed in the office of the recorder of deeds of the proper county, in which the principal place of business of the partnership shall be situated, and shall also be recorded by him at large, in a book to be kept for that purpose open to public inspection: If the partnership shall have places of business situated in different counties, a transcript of the certificate and of the acknowledgment thereof, duly certified by the recorder in whose office it shall be filed, and under his official seal, shall be filed and recorded in like manner in the office of the recorder of every such county.

SECTION 7. At the time of filing the original certificate, with the evidence of the acknowledgment thereof, as before directed, an affidavit of one or more of the general

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[3] See, however, Act of 1858, section 1, *infra*, page 5.

partners shall also be filed in the same office, stating the sums specified in the certificate to have been contributed by each of the special partners to the common stock, and to have been actually, and in good faith, paid in cash.

SECTION 8. No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged and filed, and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners.

SECTION 9. The partners shall publish the terms of the partnership, when registered, for at least six weeks immediately after such registry, in two newspapers, to be designated by the recorder of deeds of the county in which such registry shall be made, and to be published in the county or counties in which their business shall be carried on; and if such publication be not made, the partnership shall be deemed general.

SECTION 10. Affidavits of the publication of such notice by the printers of the newspapers in which the same shall be published, may be filed with the recorder, directing the same, and shall be evidence of the facts therein contained.

SECTION 11. Every renewal or continuance of such partnership beyond the time originally fixed for its duration, shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership.

SECTION 12. Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and every such partnership which shall

in any manner be carried on after any such alteration shall have been made, shall be deemed a general partnership, unless renewed as a special partnership, according to the provisions of the last section.

SECTION 13. The business of the partnership shall be conducted under a firm, in which the names of the general partners only shall be inserted, without the addition of the word "Company,"[4] or any other general term, and if the name of any special partner shall be used in such firm, with his privity, he shall be deemed a general partner.

SECTION 14. Suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners.

SECTION 15. No part of the sum which any special partner shall have contributed to the capital stock, shall be liable for any debts previously contracted by the general partners, nor shall any part of such sum be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital, and if after the payment of such interest, any profits shall remain to be divided, he may also receive his portion of such profits.

SECTION 16. If it shall appear that by the payment of interest or profits to any special partner, the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital, with interest.

SECTION 17. A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management, but he shall not transact any business on account of the partnership, nor

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[4] See, however, Act of 1865, section 2, and 1868, section 1, *infra*, page 9.

be employed for that purpose as agent, attorney or otherwise; if he shall interfere contrary to these provisions, he shall be deemed a general partner.

SECTION 18. The general partners shall be liable to account to each other and to the special partners, for the management of their concern, both in law and equity, as other partners now are by law.

SECTION 19. Every partner who shall be guilty of any fraud in the affairs of the partnership, shall be liable civilly to the party injured, to the extent of his damage.

SECTION 20. Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances and with the like intent, shall be void as against the creditors of the partnership.

SECTION 21. Every such sale, assignment, or transfer of any of the property or effects of the general or special partner, made by such general or special partner when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own or of the partnership a preference over creditors of the partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances and with the like intent, shall be void as against the creditors of the partnership.

SECTION 22. Every special partner who shall violate any provision of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner.

SECTION 23. In case of the insolvency or bankruptcy

of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied.

SECTION 24. No dissolution of such partnership by the acts of the parties, shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the recorder's office in which the original certificate was recorded, and published once in each week for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business.

ACT OF APRIL 16, 1838.[5]

A general partner in any limited partnership may, with the assent in writing of his partner, by deed duly acknowledged and recorded, or by last will and testament, in writing, sell, assign, dispose of or bequeath his interest in such limited partnership; and when such general partner dies without having disposed of his interest in such limited partnership, his administrator or executor may, in like manner, sell, assign and transfer his interest therein for the benefit of his estate; and on every such sale, transfer or bequest, a corresponding alteration shall be made in the name or firm under which the business of such partnership is conducted, and the same shall be forthwith acknowledged, certified, recorded and published, in the same manner as is provided by law in the case of the original formation of the partnership.

A special partner, with the assent of his partner, in writing, first had and obtained, may sell or assign his interest in a limited partnership without causing thereby a dissolution of the partnership.

The insolvency of any special partner shall not cause

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[5] P. L. 689, 691.

a dissolution of the limited partnership, but his interest therein shall be sold by his assignees for the benefit of his creditors.

When any special partner shall die, without having disposed of his interest in the limited partnership, his executor or administrator may either continue his interest therein for its unexpired term, for the benefit of his estate, or may sell the same at public auction, under the direction of the Orphans' Court of the county in which the principal place of business of such partnership may be, in the same manner as the estates of intestates are now by law sold; testamentary dispositions, in writing, of the interest of special partners may also be made; the decease of special partners shall not dissolve such limited partnership, unless by the agreement between the parties it is provided that such decease shall have that effect.

Every alteration in such limited partnership, according to the provisions of this resolve, shall be notified to the general partner, and shall be duly acknowledged, certified and recorded, as in the case of the original formation of such partnership.

ACT OF APRIL 21, 1858.[6]

SECTION 1. The terms of the partnership required to be published by the ninth section of the act to which this is a further supplement [Act of March 21st, 1836] shall consist of—

I. The name of the firm under which such partnership shall be conducted.

II. The general nature of the business intended to be transacted.

III. The names of the general partners, and their respective places of residence.

IV. The aggregate amount of capital contributed by the special partners to the common stock.

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[6] P. L. 383.

V. The period at which the partnership is to commence, and the period at which it will terminate.

SECTION 2. The consent of the partners to a sale or transfer, by either the general or special partners, of their respective interests in the partnership, in pursuance of the resolution of the sixteenth of April, one thousand eight hundred and thirty-eight, may be given in advance, either in the original articles of partnership or other like instrument; and a sale or transfer of any part or share of the interest in the firm of any partner, if made in pursuance of the articles of copartnership, or previously expressed consent of the partners as aforesaid, shall be equally valid as a sale of the whole interest of any one or more of the partners; and it shall further be lawful for the general partner or partners, or either of them, to purchase part or the whole of the interest or shares of one or more of the special partners.

SECTION 3. The capital of the firm may be increased either by taking in new special partners, or new subscriptions of capital from the partners previously in the firm; such increase being made in pursuance of the consent of the partners, as expressed in the original articles of partnership, or in any subsequent instrument of writing.

SECTION 4. Every such increase of capital shall be duly acknowledged, certified and recorded; but no neglect in recording the certificate of any such increase of capital, or of any sale or transfer of the interests or shares of the special partners, or any of them, shall be construed to operate as a dissolution of the firm, or to make the special partners liable as general partners.

ACT OF MARCH 30, 1865.[7]

SECTION 1. It shall and may be lawful for any special partner to make his contribution to the common stock of any

[7] P. L. 46.

limited partnership, he may become a member of, in cash, goods or merchandize: *Provided,* That when such contributions are made, in goods or merchandize, the same shall first be appraised, under oath, by an appraiser, who shall be appointed by the court of common pleas of the county, in which such partnership is to be carried on: *And provided also,* That in the certificate now required by law, the nature and value of the said goods shall be fully set forth and described.

SECTION 2. The business of the partnership shall be conducted under a firm, in which the names of all the general partners shall be inserted, except, that when there are more than two general partners, the firm name may consist of either two of such partners, with the addition of the words, "and company," but the said partnership shall put up, upon some conspicuous place on the outside, and in front of the building in which it has its chief place of business, some sign, on which, shall be painted, in legible English characters, all the names, in full, of all the members of said partnership, stating who are general, and who are special, partners.

ACT OF FEBRUARY 21, 1868.[8]

SECTION 1. The firm name of any limited partnership may consist of the name of any general partner, with the addition of the words "and company," notwithstanding the name of such general partner may be common to him and any special partner; but the said partnership shall put up the sign required by the second section of the act approved the thirtieth of March, one thousand eight hundred and sixty-five, to which this is a supplement.[9]

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[8] P. L. 42.

[9] For annotations to these statutes see Pepper and Lewis's Digest of Laws, edition of 1909, title, Limited Partnership, paragraph 1, *et seq.*

SECTION 2.—ASSOCIATIONS ORGANIZED ON THE REPRESENTATIVE PRINCIPLE.

REGISTERED PARTNERSHIPS UNDER THE ACT OF 1899.[1]

SECTION 1. Where two or more persons may desire to associate themselves in partnership for the purpose of conducting any kind or kinds of business, trade or occupation, except the construction and operation of electric light and power companies, *banking or trust companies,* artificial or natural gas companies, water companies, railroad, street passenger railway, or traction companies, within this State, or any portion of the United States or elsewhere, whose principal office or place of business shall be specified in the way and manner hereinafter set forth as being intended to be established and maintained within this State, and may desire to limit the liability of one or more or all of the partners for the debts of the partnership to the amount of capital subscribed by such partner or partners, respectively, it shall and may be lawful to do so in the manner following, to wit: Said partners, so desiring to associate themselves, shall subscribe to articles of partnership, wherein shall be stated the name and style of the partnership, its purposes and duration, the county wherein its principal office or place of business is to be located, the names of the several partners, and the amount of the capital subscribed by each partner and when and how the same is to be paid, and the names of the partners, one or more or all, whose liability is to be limited to the amount subscribed by each to the capital. Such articles of partnership shall be acknowledged before some officer competent to take the acknowledgment of deeds, and shall be recorded in the office of the recorder of deeds of the county in which is located the place designated as the principal office or place of business. Amend-

[1] Act of May 9, P. L. 261.

ments to said articles of partnership shall be made in like manner, and shall be effective only when recorded in the office of the said recorder of deeds. A copy of said articles of partnership, and of all amendments thereto, duly certified by the recorder of deeds, shall also be filed, within thirty days after the recording of said articles or amendments in said recorder's office, in the office of the Secretary of the Commonwealth. The business of the partnership may be commenced after the articles of partnership have been left for record in the office of the recorder of deeds.[2]

SECTION 2. Notice of the formation of the partnership shall be published in a newspaper of general circulation in the county wherein is located the place designated as the principal office, or place of business. This notice shall be published once a week for three weeks. The first publication shall appear not later than the day following the filing of the articles of partnership in the office of the recorder of deeds. This notice shall state the name, style and general purpose of the partnership, the names of the partners, the amount of capital subscribed for by each partner, and when and how the amount of such subscription is to be paid. It shall also state the fact that the liability of one or more or all of the partners is limited in accordance with this statute, and that the articles of partnership have been left for record in the office of the recorder of deeds. If a time be fixed in the articles of partnership for its duration, such time shall also be stated in the said notice. No name or style of partnership shall be adopted which will include the name of any partner whose liability is intended to be limited, unless there shall be added the word "Registered."

SECTION 3. No member of any such partnership thus formed, recorded and published, whose liability is stated as intended to be limited in the manner hereinbefore set forth, shall be liable for its debts under any circumstances saving to the extent of the amount of his or her subscription, with

[2] The words in italics were added by the Act of July 9, 1901, P. L. 625.

interest on unpaid subscriptions from the date or dates at which the same became actually due and payable. Payment of the amount of the subscription of such member of the partnership, with interest as aforesaid, shall exonerate such partner from all further liability. A partner or partners whose liability is thus limited shall not be precluded from transacting business with or for the partnership.

SECTION 4. It shall be lawful for said partnership to adopt such by-laws, rules and regulations, as a majority of the number in interest of the partners from time to time may prescribe for the regulation of the affairs of the partnership. Official positions for the transaction of the business of the partnership may be constituted by such by-laws, rules and regulations, and the powers and duties of the respective officers prescribed therein. The partners may provide that certain only of the members shall have active charge of the business and be authorized to enter into contracts, undertakings or engagements whereby the partnership shall be held liable, and may change the same as they see fit. It shall be optional with the partnership whether such provision shall or shall not be made. It shall also be optional with the partnership, if such provision be made, to state the same in the original articles of partnership, or in amendments thereto, or in any statement subscribed by the partners. If the partners shall desire, any such statement may be acknowledged, and may be recorded in the office of the said recorder of deeds. The partnership may at its option adopt and use a common seal.

SECTION 5. It shall be the duty of said partnership to keep posted in the place designated as its principal office, or place of business, in some place therein accessible to the public during business hours, a plainly written or printed list of the partners with the amount of capital subscribed by each, the amount paid in by each partner, and in the case of any partner whose liability is limited the words "Limited Liability" shall be added to his name where it appears in such list. This notice shall also state the volume and

page of the record of the articles of partnership in the office of the recorder of deeds. If on the signs used by the partnership, or if on any bill-heads, letter-heads, or other publications of the partnership, the names of the several partners should be stated, the words "Limited Liability" shall be added to the name of the partner whose liability is limited in the way herein provided. A violation of any of the provisions of this section shall be a misdemeanor. Each member of the partnership who shall participate in such violation shall be liable to prosecution for such misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than one hundred dollars, and not more than five hundred dollars, for each violation of the provisions of said section.

SECTION 6. If any partner whose liability is limited in the manner herein provided shall obtain credit, money, goods or other valuable thing by a false statement to the effect that he is a general partner, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of not less than one hundred dollars, and not more than five hundred dollars.

SECTION 7. Interest in said partnership shall be personal estate, and may be transferred, given, bequeathed, distributed, sold or assigned, under such rules and regulations as may, from time to time, be prescribed by a vote of the majority in number and interest of the partners; but, in the absence of such rules and regulations, the transferee of any such interest shall not be entitled to participation in the subsequent business of the partnership unless elected as a partner therein by a vote of the majority in number and interest of the remaining partners. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which shall occur in the absence of such rules and regulations, and which shall not be followed by election to membership, shall entitle the owner or transferee to the book value of the interest so acquired, as ascertained and fixed, as hereinafter provided, at the last period preceding the date at which the member parted with or lost his interest,

with interest from such date. It shall be the duty of the partnership at the close of each calendar year to ascertain and fix the book value of the several interests, a copy of which statement shall be delivered to each partner, and this settlement shall be conclusive and final upon all members of the said partnership, and upon all subsequent owners or transferees of any interest. The transfer of any interest, however occurring, shall not dissolve the partnership, nor shall said partnership be dissolved by reason of the death of one or more of the partners, unless the articles of association shall prescribe to the contrary. In case of a change in the members of the partnership by reason of death, transfer or otherwise, it shall not be necessary to make any publication of the fact thereof.

SECTION 8. If at the expiration of the time fixed for the duration of the partnership, if any time be so fixed, the persons then constituting the partnership shall desire to renew the same, they may do so by articles specifying the fact of such renewal and the length of time fixed for the duration of the renewed partnership. Such agreement of renewal shall be recorded and published in the way and manner hereinbefore provided in the case of an original partnership.

SECTION 9. The partnership may take, hold, mortgage, incumber, lease or convey, in fee simple, or for any less estate, real estate or interests therein, in the firm name. The place of record of the articles of partnership shall be stated in all instruments of writing relating to real estate, but failure so to state shall not invalidate the instrument. Any instrument relating to real estate may be signed or sealed by one or more of the partners, for the partnership and in the partnership name, if the by-laws, rules or regulations shall so provide, but in case less than all the partners are vested with this power the fact shall be stated in the original articles of partnership, or in amendments thereto, or in a statement duly signed and acknowledged by the partners and recorded in the office of the said recorder of deeds.

SECTION 10. Partnerships may be dissolved at any time

by a vote of the majority in number and interest of those who at such time shall constitute the partnership, unless the articles of association shall provide to the contrary. In case of dissolution for any cause, whether by expiration of the period fixed for the partnership or otherwise, notice thereof shall be published in one newspaper published in the county designated as the place wherein the principal office, or place of business, is located, for six consecutive issues, and immediately upon the commencement of said advertising said partnership shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof. In case of dissolution, one or more liquidating partners shall be elected by a vote of the majority in interest of the partners, who shall have full power, and be charged with the duty of settling the affairs of the partnership and distribution of the assets thereof after payment of its debts among the partners in proportion to their interest.

SECTION 11. The partnership shall sue and be sued in the partnership name, and not by or in the individual names of the partners. Service in case of suit may be had upon any partner in the county designated as that in which the principal office, or place of business, of the partnership may be located. If no partner can be served in such county, service may be made upon any one or more of the partners in any county of the Commonwealth in which service can be had.

SECTION 12. All laws or parts of laws inconsistent herewith are hereby repealed. Nothing herein contained, however, shall prevent the formation of limited partnerships under the act approved the twenty-first day of March, one thousand eight hundred and thirty-six, and the supplements thereto, or the formation of joint stock companies under the provisions of the act approved the second day of June, one thousand eight hundred and seventy-four, and the supplements thereto.[3]

[3] See also, Pepper and Lewis's Digest of Laws, edition of 1909, title, Limited Partnerships, paragraphs 38-60.

PARTNERSHIP ASSOCIATIONS UNDER THE ACT OF 1874.[1]

FORMATION.

SECTION 1. When any three or more persons may desire to form a partnership association, for the purpose of conducting any lawful business or occupation, *including the construction, equipment, installation, and operation of a telephone or telegraph line,* within the United States, or elsewhere, whose principal office or place of business shall be established and maintained within this State, by subscribing and contributing capital thereto, which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge, before some officer competent to take the acknowledgment of deeds, a statement, in writing, in which shall be set forth the full names of such persons, and the amount of capital of said association subscribed for by each; the total amount of capital, and when and how paid; the character of the business to be conducted, and the location of the same; the name of the association, with the word "limited" added thereto as part of the same; the contemplated duration of said association, which shall not in any case exceed twenty years, and the names of the officers of said association, selected in conformity with the provisions of this act; and any amendment of said statement shall be made only in like manner, which said statement and amendments shall be recorded in the office of the recorder of deeds of the proper county: *Provided, however, That the capital stock of any telephone or telegraph company, incorporated or created in accordance with the provisions of this act, shall not be capitalized at more than the sum of five thousand dollars.*[2]

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[1] Act of June 2, 1874, P. L. 271.

[2] The words in italics were added by the Act of June 7, 1907, P. L. 432.

As to the character of the capital to be contributed, see *infra*, page 21.

LIABILITY OF MEMBERS OF THE ASSOCIATION.

SECTION 2. The members of any such partnership association shall not be liable under any judgment, decree or order which shall be obtained against such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided; that is to say, if any execution, sequestration or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof, whereon to levy or enforce such execution, sequestration or other process, then such execution, sequestration or other process may be issued against any of the members to the extent of the portions of their subscriptions, respectively, in the capital of the association not then paid up: *Provided always,* That no such execution shall issue against any member, except upon an order of court or of a judge of the court in which the action, suit or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association, showing the names of the members thereof and the amount of capital remaining to be paid upon their respective subscriptions, and from them or other sources of information, ascertain the truth in regard thereto, and may order execution to issue accordingly; and the said association shall be and it is hereby required to keep a subscription list book for that purpose, and the same shall be open to inspection by the creditors and members of the association at all reasonable times.

SECTION 3. The word "limited" shall be the last word of the name of every partnership association, formed under the provisions of this act; and every such association shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the association is carried on, in a conspicuous position, in letters easily legible, and shall have its full name mentioned in legible characters in all notices, advertisements and

other official publications of such association, and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters and other writings used in the transaction of the business of the partnership association: *Provided,* That the omission of the word "limited" in the use of the name of the partnership association shall render each and every person participant in such omission, or knowingly acquiescing therein, liable for any indebtedness, damage or liability arising therefrom.

TRANSFER OF INTEREST.

SECTION 4. Interests in such partnership associations shall be personal estate, and may be transferred, *given, bequeathed, distributed, sold or assigned,* under such rules and regulations as such partnership associations shall, *from time to time,* prescribe *by a vote of a majority of the members in number and value of their interests; and in the absence of such rules and regulations,* the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy or otherwise, *which occurs in the absence of any rules and regulations of such associations regulating such transfer,* and which is not followed by election to membership in such associations, shall entitle the owner *or transferee* only to the value of the interest so acquired *at the date of acquiring such interest,* at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, *on the petition of either party,* which appraisement shall be subject to the approval of said court.[3]

[3] The words printed in italics were added by the Act of June 25, 1885, P. L. 182. This first amendment, without changing the meaning, changes slightly the wording of the text of the section as it stood in the Act of 1874.

ORGANIZATION.

SECTION 5. There shall be at least one meeting of the members of the association in each year, at one of the meetings there shall be elected not less than three nor more than five [nine] managers of the association, one of whom shall be the chairman, one the treasurer and one the secretary, or the offices of both treasurer and secretary may be filled by one person, who shall hold their respective offices one year and until their successors are duly installed. *The board of managers are authorized to fix the salary and compensation of such officers and the salary and compensation of other employés, but the president, secretary and treasurer shall not receive, as salary or compensation, after such association has been in existence for five years, a sum in the aggregate greater than the amount of net earnings actually earned during the year preceding, unless by the consent of two-thirds of all the members of the association; and the salary of the president, secretary and treasurer shall be fixed for the ensuing year, by a two-thirds vote of the value of interest present at the annual meeting of the association, and after the annual report has been made.* No debt shall be contracted or liability incurred for such association except by one or more of the managers, and no liability greater than five hundred dollars except against the person incurring it shall bind the association, unless reduced to writing and signed by at least two managers.[4]

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[4] The words printed in italics were added by the Act of May 10, 1889, Section 1, P. L. 183. The wording, but not the meaning, of the rest of the section is slightly changed. See *supra*, note 3. The section was slightly amended by the Act of June 11, 1879, P. L. 124, which permitted seven managers to be chosen. The Act of 1889 returns to the earlier provision on this subject. The section, however, is again modified by the Supplement of June 8, 1895, P. L. 186, which provides: "Section 2. That all associations organized under the act to which this is a supplement shall have the power, by the vote of a majority in number and interest of its members, to adopt by-laws for the regulation thereof, fixing therein the number of managers, which number shall not be less than three nor more than nine, and designating the principal executive officer either as president or chairman.

"Section 3. The managers of all associations, organized under the

CERTAIN RIGHTS AND DUTIES.

SECTION 6. The association may, from time to time, divide the profits of its business in such manner and in such an amount as a majority of its managers may determine, which profits so divided shall not at the time diminish or impair the capital of the said association; and any one consenting to a dividend which shall diminish or impair the capital shall be liable to any person or persons interested or injured thereby to the amount of such diminution or impairment.

SECTION 7. It shall not be lawful for such association to loan its credit, its name or its capital to any member of said association, and for such loan to any other person or association the consent in writing of a majority in number and value of interest shall be requisite.

DISSOLUTION.

SECTION 8. Such association may be dissolved.

First. Whenever the period fixed for the duration of the association expires.

Second. Whenever, by a vote of a majority in number and value of interest, it shall be so determined, and notice of such winding up shall be given by publication in two newspapers published in the proper city or county at least six consecutive times, and immediately upon the commencement of said advertising, said association shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof.

SECTION 9. When any such partnership association shall be dissolved by the voluntary action thereof, its property shall be applied and distributed as follows:

First. To the payment of all debts for wages of labor.

Second. To the satisfaction of its other liabilities and indebtedness.

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act to which this is a supplement, shall be chosen by ballot, in person or by proxy, by a majority in value of interest of the members thereof voting at such election."

Third. After payment thereof, the same shall be distributed to and among the members thereof in proportion to their respective interests, in the following manner:

Fourth. Three liquidating trustees, *not more than two of whom shall have been a manager of the association so dissolved and in liquidation*, shall be elected by the members of the association, who shall have full power to settle the affairs of the association, and distribute the assets thereof after the payment of its debts, among the members under the direction of the court of common pleas of the proper county.[5]

SECTION 10. That no amendment, modification or repeal of this act shall affect any thing duly done, right acquired, liability incurred, or penalty, forfeiture or other punishment incurred or to be incurred, in respect of any offence against the provisions of this act before such amendment, modification or repeal comes into operation.

EXECUTION OF DEEDS.[6]

SECTION 1. Whenever any association, formed under the act to which this is a supplement, shall have occasion to execute any deed of conveyance, or bonds with or without coupons, and mortgages, to secure, purchase or borrow moneys, such association shall have a right to adopt and use a common seal, and to acknowledge such instruments or writings by their chairman and secretary.

CHARACTER OF CONTRIBUTION.[7]

SECTION 1. It shall and may be lawful for any person desiring to form a partnership association, under the act to which this is a supplement, to make contribution to the capital thereof in real or personal estate, mines or other property, at a valuation to be approved by all the members

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[5] The words printed in italics were added by the Act of May 10, 1889, Section 2, P. L. 184. The wording, but not the meaning of the rest of the clause is slightly changed. See *supra*, note 3.

[6] Act of February 18, 1875, P. L. 3.

[7] Act of May 1, 1876, P. L. 89.

subscribing to the capital of such association: *Provided,* That in the statement required to be recorded by the first section of the said act, subscriptions to the capital, whether in cash or in property, shall be certified in this respect according to the fact; and when property has been contributed as part of the capital, a schedule containing the names of the parties so contributing with a description and valuation of the property so contributed shall be inserted.

SECTION 2. That all contributions to the capital of such associations, heretofore organized under the act to which this is a supplement, in real or personal estate, mines or other property, at a valuation agreed upon by all the members subscribing to such capital, shall be as complete and effectual as if the same had been made in cash: *Provided,* A certificate of the same shall be recorded as required in the first section of this act.

SECTION 3. That all real estate owned or purchased by any association heretofore created, or which may be hereafter created, under and by virtue of the act to which this is a supplement, shall be held and owned and conveyance thereof shall be made in the association name; that said association shall sue and be sued in their association name; and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association.

SERVICE OF LEGAL PROCESS.[8]

SECTION 1. Any partnership association, organized under the said act and the several supplements thereto, may, in addition to the methods already authorized, be served with legal process in any county of this commonwealth where said association shall maintain and keep an office for the transaction of business, by serving such process upon any agent, chief or any other clerk or upon any director

[8] Act of June 10, 1881, P. L. 115.

or manager of such association, and such service shall be good and valid in law to all intents and purposes as service upon such association.

CONTINUATION.[9]

SECTION 1. It shall and may be lawful for a majority in number and value of interest of the members of any partnership association formed under the provisions of the act of Assembly to which this is a supplement, to renew or continue such partnership association for a period of time not exceeding twenty years beyond the time originally fixed for its duration, under the following conditions and restrictions, to wit:

First. A meeting of the members of the association shall be called, of the time, place and object of which meeting due notice shall be given by publication once a week for two successive weeks preceding such meeting in one newspaper published in the county in which the principal office or place of business shall be established, and by such further notice as shall be prescribed in the by-laws; and at such meeting the resolution for the renewal or continuance of the association shall be considered, and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same; and if a majority in number and value of interest of the members of such association shall be in favor of such renewal or continuance, then a statement in writing shall be signed and acknowledged by three or more members, in which shall be set forth the full names of the members desiring to renew or continue such association, and the contemplated duration or continuance, which shall not in any case exceed twenty years beyond the time originally fixed for the duration of the association.

Second. Upon the filing of such statement such association shall be renewed and may be continued for the extended time herein mentioned.

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[9] Act of June 8, 1895, P. L. 186.

Third. That if any member of any such partnership association shall be dissatisfied with or object to any such renewal or continuance, then the owner shall be entitled to his interest in the association at a price and upon terms to be mutually agreed upon; and in default of such agreement, the price and terms shall be fixed by an appraiser appointed by the court of common pleas of the proper county, subject to the approval of the said court, and, upon the payment of the interest as aforesaid, the said member shall transfer his interest to said association to be disposed of by the managers, or be retained by them for the benefit of the remaining members.

THE CORPORATION ACT OF 1874.[1]

SECTION 1. Corporations may be formed under the provisions of this act by the voluntary association of five or more persons, for the purposes, and in the manner mentioned herein, and when so formed, each of them by virtue of its existence as such, shall have the following powers, unless otherwise specially provided:

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[1] Act of April 29, 1874, P. L. 73. Those sections of the Act which relate only to one or more kinds of corporations, but not to all corporations of either the first or second class, or both, are omitted.

Besides the Act of 1874, its amendments and supplements, many different kinds of companies have been made, both before and since the Act of 1874, the subject of separate legislation. A list of the more important acts relating to railroad and street railroad companies and other important kinds of companies, will be found *infra*, page 78; but a complete view of the history and present status of the legislation of the State on corporations, apart from the special charters granted prior to the Constitution of 1874, can be obtained by examining Pepper and Lewis's Digest of Laws, edition of 1909, title, Corporations, cols. 1659-2044, and the other titles referred to, col. 1659, together with the list of acts repealed, amended, supplied and in force, printed in connection with the title Corporations, cols. 1676-1687, and similar lists printed in connection with such titles as Banks and Banking, Insurance, Railroads and Canals, and other titles referred to, col. 1659.

The provisions in the Constitution of the State relating to corporations will be found in Art. III, Section 7; which provides, "The General Assembly shall not pass any * * * special law * * * creating corporations, or amending, renewing, or extending the charters thereof"; Art. IX, Section 3, which provides, that "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party"; Art. IX, Section 7, which prohibits the General Assembly from authorizing any public corporation to become a stockholder in, or to loan its credit to, any corporation; and Art. XVI, which relates exclusively to private corporations.

The provisions of Art. XVI to be especially noticed are, Section 4, which provides that "In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer"; Section 6, which prohibits any corporation from engaging in any business not "expressly authorized in its charter"; Section 7, which provides that stock or bonds shall not be issued, "except for money, labor done, or money or property actually received," and that the stock and indebtedness shall not be increased except in pursuance of general law, "nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after sixty days' notice given in pursuance of law"; and Section 10, which confers on the General Assembly the power "to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators."

GENERAL POWERS.

First. To have succession by its corporate name for the period limited by its charter, and when no period is limited thereby, or by this act, perpetually, subject to the power of the general assembly, under the constitution of this commonwealth.

Second. To maintain and defend judicial proceedings.

Third. To make and use a common seal and alter the same at pleasure.

Fourth. To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by law.

Fifth. To appoint and remove such subordinate officers and agents as the business of the corporation requires, and to allow them a suitable compensation.

Sixth. To make by-laws not inconsistent with law, for the management of its property, the regulation of its affairs and the transfer of its stock.

Seventh. To enter into any obligation necessary to the transaction of its ordinary affairs.

CLASSES.

SECTION 2. The purposes for which the said corporation may be formed, shall be as follows, and shall be divided into two classes:

CORPORATIONS NOT FOR PROFIT—FIRST CLASS.

The first, those for—

I. The support of public worship.

II. The support of any benevolent, charitable, educational or missionary undertaking.

III. The support of any literary, medical or scientific undertaking, library association, or the promotion of music, painting or other fine arts.

IV. The encouragement of agriculture and horticulture.

V. The maintenance of public or private parks, and of facilities for skating, boating, trotting and other innocent or athletic sports, including clubs for such purposes, and for the preservation of game and fish.

VI. The maintenance of a club for social enjoyments.

VII. The maintenance of a public or private cemetery.

VIII. The erection of halls for public or private purposes.

IX. The maintenance of a society for beneficial or protective purposes to its members from funds collected therein.

X. The support of fire engine, hook and ladder, hose or other companies for the control of fire.

XI. For the encouragement and protection of trade and commerce.

XII. For the formation and maintenance of military organizations.[2]

XIII. For the maintenance of a society for the improvement of the streets and public places in any city, borough or township in this commonwealth.[3]

XIV. For receiving and holding property, real and personal, of and for unincorporated religious, beneficial, charitable, educational, and missionary societies and associations, and executing trusts thereof.[4]

[The prevention of cruelty to children and aged persons.][5]

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[2] Paragraphs XI and XII were added by the Act of June 10, 1893, P. L. 435, 439.

[3] Paragraph XIII was added by the Act of June 25, 1895, P. L. 313.

[4] Paragraph XIV was added by the Act of July 15, 1897, P. L. 283.

[5] This provision is found in the amendment to the Act of 1874, of May 25, 1887, P. L. 266. The Act of June 10, 1893, P. L. 435, which purported to amend Section 2 of the Act of 1874, in attempting to recite the section as it had been amended, omitted to include in the "Corporations not for profit," the "prevention of cruelty to children and aged persons." All reference to this class of corporations was also omitted in the enacting clauses. Query, whether this class of

Each of the said corporations may hold real estate to an amount the clear yearly value or income whereof shall not exceed twenty thousand dollars.[6]

CORPORATIONS FOR PROFIT—SECOND CLASS.

The second class, those for—

I. The insurance of the lives of domestic animals.

II. The insurance of human beings against death, sickness or personal injury.

III. The prevention and punishment of theft or wilful injuries to property, and insurance against such risks.

IV. The construction and maintenance of any species of road other than a railroad, and of bridges in connection therewith.

V. The construction and maintenance of a bridge over streams within this state.

VI. The construction and maintenance of a telegraph line.

VII. The establishment and maintenance of a ferry.

VIII. The building of ships, vessels or boats, and carriage of persons and property thereon.

IX. The supply of water to the public.

X. The supply of ice to the public.

XI. The manufacture and supply of gas, or the supply of light or heat to the public by any other means.

XII. The transaction of a printing and publishing business.

XIII. The establishment and maintenance of an hotel

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associations not for profit can now be incorporated under the Amendment of 1887?

[6] The Act of June 8, 1891, P. L. 211, provides: "It shall and may be lawful for any corporation incorporated under the laws of this State, or of any other State of the United States, to take, have and hold real estate heretofore given or devised, or hereafter given or devised to such corporation to be used for any religious or charitable purposes: *Provided*, That nothing herein contained shall be taken to relieve such real estate from being taxed in like manner with other real estate within this Commonwealth: *And provided further*, That all real estate held under the provisions of this act, shall be sold by such corporations within five years from the time the right of possession shall accrue to such corporation."

and drovcyard,[7] or boarding house, opera and market house, or either.

XIV. The creating, purchasing, holding and selling of patent rights for inventions and designs, *and the purchasing of copyrights for book publications, and registered trade-marks,*[8] with the right to issue license for the same and receive pay therefor.

XV. Building and loan association.

XVI. Associations for the purchase and sale of real estate, or for *holding, leasing and selling real estate, for maintaining or erecting walls or banks for the protection of low lying lands,*[9] for safe deposit companies, *and for buying, selling, trading or dealing in any kind or kinds of goods, wares and merchandise at wholesale.*[10]

XVII. The manufacture of iron or steel, or both, or of any other metal, or of any article of commerce from metal or wood, or both.

XVIII. The carrying on of any mechanical, mining, quarrying or manufacturing business, including all the purposes covered by the provisions of the acts of the General Assembly, entitled "An act to encourage manufacturing operations in this Commonwealth," approved April seventh, one thousand eight hundred and forty-nine, entitled "An act relating to corporations for mechanical, manufacturing, mining and quarrying purposes," approved July eighteenth, one thousand eight hundred and sixty-three, and the several supplements to each of said acts, including the incorporation of grain elevators, storage *house*[11] and storage yard companies; also including *companies for* the storage, transportation *and furnishing*[12] of water, with the right to take rivulets and land and erect

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[7] Added by the Act of June 10, 1893, P. L. 435.

[8] Added by the Act of May 16, 1889, Section 1, P. L. 241.

[9] Added by the Act of April 17, 1876, P. L. 31.

[10] Added by the Act of June 25, 1895, P. L. 295.

[11] The Act of 1874 read "Warehouse." Changed by Act of June 22, 1883, P. L. 156.

[12] Added by the Act of May 21, 1889, P. L. 259.

reservoirs for holding water, *for manufacturing and other purposes, and for the creation, establishing, furnishing, transmission and using of water power therefrom;*[13] *the construction of dams in any stream, and the driving and floating of saw logs, lumber and timber on and over any stream, not exceeding thirty-five miles in length from their source, by the usual methods of driving and floating logs, timber and lumber on streams, and so as not* [*to*] *obstruct the descending navigation by rafts and boats;*[14] *also including the manufacture and brewing of malt liquors,*[15] *and also including companies for the transaction of any lawful business not otherwise specifically provided for by act of Assembly: Provided, however, That no corporation shall be chartered under this amendment with the authority to transact more than one kind of business, which must be set forth in the charter.*[16]

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[13] Added by the Act of May 21, 1889, P. L. 259.

[14] Added by the Act of June 22, 1883, P. L. 156. The length of streams in the Act of 1883 was 20 miles. The Act of June 10, 1893, P. L. 412, extended the "length of the streams" which may be used from 20 to 35 miles. The words "from their source" were also added by the Act of 1893.

[15] Added by the Act of April 10, 1879, P. L. 20. The Act of 1874 contained the words "and excluding the distilling or manufacture of intoxicating liquors." These words were retained in all amendments until the Act of July 9, 1901, P. L. 624.

[16] Added by the Act of July 9, 1901, P. L. 20.

The difficulty of properly stating this eighteenth paragraph is greatly increased by the confusion resulting from the legislation of 1893. In that year we find two acts, both approved on June 10, one printed on page 412 of the Pamphlet Laws, the other on page 435. The act on page 412 purports to amend only the eighteenth paragraph of Section 2 of the Act of 1874. It correctly recites the paragraph as it had been extended by prior amendments, and then re-enacts the paragraph, changing merely the length of streams which may be used by certain companies. See *supra*, note 14. The act on page 435 purports to be a general amendment of Section 2 of the Act of 1874. This act, in reciting the eighteenth paragraph, recites the paragraph as it stood in the Act of 1874, ignoring the intervening amendments extending the paragraph. So also, in re-enacting the eighteenth paragraph, the language of the paragraph as it stood in the Act of 1874 was used. The Act of July 9, 1901, amends the eighteenth paragraph merely. In reciting the paragraph, the Act of 1893 printed on page 435 is ignored, and the paragraph is recited and re-enacted with the additions noted, *supra*, as the paragraph stood with all its extensions prior to the legislation of 1893. In stating the paragraph we have followed the Legislature of 1901 and, as far as this paragraph is concerned, ignored the Act of 1893, printed on page 435 of the Pamphlet Laws.

XIX. The insurance of owners of real estate, mortgagees, and others interested in real estate, from loss by reason of defective titles, liens and incumbrances.

XX. The re-chartering of corporations of either of these classes the charters whereof are about to expire.

XXI. The construction and maintenance of a wharf or wharves, for public and private use, and the maintenance of any unincorporated wharf or wharves already constructed.

XXII. The construction, erection and maintenance of observatories for public use or scientific purposes.

XXIII. The formation and operation of stage and omnibus lines.

XXIV. The formation and operation of inclined planes for the transportation of passengers and freight,[17] or for the construction and maintenance of tunnels or underground passageways.[18]

XXV. The construction and maintenance of sewers, culverts, conduits and pipes, with all necessary inlets and appliances for surface, under-surface and sewage drainage for the health, comfort and convenience of inhabitant, and sanitary improvement in cities, boroughs and townships of the Commonwealth, and for this purpose to enter upon and occupy any public highway with the consent of the local authorities.[19]

MODE OF INCORPORATION.

SECTION 3. The charter of an intending corporation must be subscribed by five or more persons, three of whom at least must be citizens of this commonwealth, and shall set forth[20]

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[17] Paragraphs XXI, XXII, XXIII, and this much of paragraph XXIV were added by the Act of April 17, 1876, P. L. 30.

[18] Added by the Act of June 25, 1895, P. L. 311.

[19] Paragraph XXV was added by the Act of June 10, 1893, P. L. 435. The Act of June 13, 1883, Section 6, P. L. 122, provided for the motors and cables."

[20] By the Act of April 23, 1903, P. L. 272, three persons may form a corporation of the second class; two of whom must subscribe to the charter, one of whom must be a citizen of Pennsylvania.

CONTENTS OF CERTIFICATE.

I. The name of the corporation.

II. The purpose for which it is formed.

III. The place or places where its business is to be transacted.

IV. The term for which it is to exist.

V. The names and residence of the subscribers and the number of shares subscribed by each.

VI. The number of its directors and the names and residences of those who are chosen directors for the first year.

VII. The amount of its capital stock, if any, and the number and par value of shares into which it is divided.[21]

NOTICE TO BE GIVEN.

Notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation, printed in the proper county, for three weeks, setting forth briefly the character and object of the corporation to be formed, and the intention to make application therefor.

CERTIFICATES FOR FIRST CLASS.

The said certificates of incorporation of the first class shall be acknowledged by at least three of those who subscribe to them before the recorder of deeds of the county in which the business of the corporation is to be transacted,

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[21] The Act of June 25, 1895, P. L. 310, Section 1, provides: "All corporations organized not for profit under the provision of 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, one thousand eight hundred and seventy-four and the several supplements thereto, shall have authority, if a majority of its members shall so ordain, to issue capital stock to an amount not exceeding two hundred a..d fifty thousand dollars, in shares of the par value of fifty dollars. ' Said power to vest upon the recording of the minute authorizing said issue in the county in which the corporation was created, and filing an exemplification thereof with the Secretary of the Commonwealth. Thereafter such corporations shall be subject to the same taxation as corporations for profit."

The Act of May 23, 1887, P. L. 165, provides that the charter may contain a provision that one-half or one-third or one-fourth of the board of directors shall be elected each year. See *infra*, note 28.

to be their act and deed, and the same being duly certified under the hand and official seal of the said recorder of deeds [or a notary public of the commonwealth of Pennsylvania][22] shall be presented to a law judge of the said county, accompanied by proof of the publication of the notice of such application, who is hereby required to peruse and examine said instrument, and if the same shall be found to be in the proper form, and within the purposes named in the first class specified in the foregoing section, and shall appear lawful and not injurious to the community, he shall endorse thereon these facts, and shall order and decree thereon that the charter is approved, and that upon the recording of the said charter and order, the subscribers thereto and their associates, shall be a corporation for the purposes and upon the terms therein stated, and the said order and charter shall be recorded in the office for the recording of deeds in and for the county aforesaid, and from thenceforth the persons named therein and subscribing the same, and their associates and successors, shall be a corporation by the name therein given.[23]

CERTIFICATES FOR SECOND CLASS.

The certificate for a corporation embraced within the second class, named in the foregoing section, shall set forth all that is hereinbefore required to be set forth, and except building and loan associations, shall also state that ten per centum of the capital stock thereof has been paid in cash to the treasurer of the intended corporation, and the name and residence of such treasurer shall be therein given. The same shall be acknowledged by at least three of the subscribers thereto, before the recorder of deeds of the county

[22] For the provision in brackets see Act of April 25, 1891, P. L. 18.

[23] By the Act of February 20, 1854, P. L. 90, the Court, in granting a charter of incorporation for any purpose, is required "to limit the yearly income of such corporation, other than from real estate, to such sums as in the opinion of the Court will not be injurious or prejudicial to the community." The better practice is to set forth in the certificate itself the limit of the income. *In re* Middletown Country Club, 30 Pa. C. C. 174, 1904.

in which the chief operations are to be carried on, or in which the principal office is situated [or a notary public of the commonwealth of Pennsylvania],[24] and they shall also make and subscribe an oath or affirmation before him, to be endorsed on the said certificate, that the statements contained therein are true. The said certificate, accompanied with proof of publication of notice as hereinbefore provided, shall then be produced to the governor of this commonwealth, who shall examine the same, and if he find it to be in proper form and within the purposes named in the second class, specified in the foregoing section, he shall approve thereof and endorse his approval thereon, and direct letters patent to issue in the usual form, incorporating the subscribers and their associates and successors into a body politic and corporate, in deed and in law, by the name chosen, and the said certificate shall be recorded in the office of the secretary of the commonwealth, in a book to be by him kept for that purpose, and he shall forthwith furnish to the auditor general an abstract therefrom, showing the name, location, amount of capital stock, and name and address of the treasurer of such corporation. The said original certificate, with all of its endorsements, shall then be recorded in the office for the recording of deeds, in and for the county where the chief operations are to be carried on, and from thenceforth the subscribers thereto, and their associates and successors, shall be a corporation, for the purposes and upon the terms named in the said charter. Certified copies of both the records thereof and of the charters of the corporations named in the first class specified in the foregoing section, shall be competent evidence for all purposes in the courts of this commonwealth. The secretary of the commonwealth shall charge and receive a fee of five dollars upon every paper relating to a corporation filed or recorded in his office.

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[24] See, *supra*, note 22. Query: Whether the acknowledgment before a notary must be in the county where the chief operations are carried on, or in which the principal office is situated?

In view of the Act of April 23, 1903, *supra*, note 20, a corporation for profit formed by three persons, would only have to be subscribed and acknowledged by two persons.

LENGTH OF GRANT—POWER TO REVOKE.

SECTION 4. The charters for incorporations named in this act may be made perpetual, or may be limited in time by their own provisions; and the general assembly reserves the power to revoke or annul any charter of incorporation granted or accepted under the provisions of this act, whenever in the opinion of the said general assembly it may be injurious to the citizens of this commonwealth, in such manner, however, that no injustice shall be done to the corporators or their successors.

GOVERNOR TO ISSUE LETTERS PATENT.

[Upon the application of the president and secretary of any corporation heretofore or hereafter created under any general or special law of this commonwealth, accompanied by due proof that said corporation has complied with all the conditions provided by law and the constitution to enable it to have a corporate existence and transact business, it shall be lawful for the governor to issue letters patent under the great seal of the commonwealth, in such form as he may prescribe, to such corporation, declaring it to be and erecting it into a body corporate or politic in deed and in law.][25]

BY-LAWS.

SECTION 5. The by-laws of every corporation created under the provisions of this statute, or accepting the same, shall be deemed and taken to be its law, subordinate to this statute, the charter of the same, the constitution and laws of this commonwealth, and the constitution of the United States. They shall be made by the stockholders or members of the corporation, at a general meeting called for that purpose, unless the charter prescribes another body, or a different mode. They shall prescribe the time and place of meeting of the corporation, the powers and duties of its

[25] Act of May 15, 1874, P. L. 186. It was not an amendment or supplement to the Act of 1874.

officials, and such other matters as may be pertinent and necessary for the business to be transacted, and may contain penalties for the breach thereof, not exceeding twenty dollars.

OFFICERS AND THEIR DUTIES.

The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors or trustees, a *secretary or* clerk, a treasurer, and such other officers, agents and factors as the corporation authorizes for that purpose, *and nothing in any law contained shall prevent or be construed to prohibit the vice president, treasurer, solicitor, or other officer of any corporation organized or existing under this act, from being a director of such company and receiving at the same time such compensation for his services as such officer as the board of directors of such company may direct.* The directors or trustees shall be chosen annually by the stockholders or members, at the time fixed by the by-laws, and shall hold their office until others are chosen and qualified in their stead; the manner of such choice, and of the choice or appointment of all other agents and officers of the company shall be prescribed by the by-laws. The number of directors or trustees shall not be less than three; one of them shall be chosen president by the directors, or by the members of the corporation, as the by-laws shall direct. The members of said corporation may, at a meeting to be called for that purpose, determine, fix or change the number of directors or trustees that shall thereafter govern its affairs, and a majority of the whole number of such directors or trustees shall be necessary to constitute a quorum. The *secretary or* clerk shall be sworn and shall record all the votes of the corporation and the minutes of its transactions in a book to be kept for that purpose. The treasurer shall give bond in such sum, and with such sureties, as shall be required by the by-laws for the faithful discharge of his duties, and he shall keep the moneys of the corporation in a separate book account to his credit as treasurer,

and if he shall neglect or refuse so to do, he shall be liable to a penalty of fifty dollars for every day he shall fail to do so, to be recovered at the suit of any informer in an action of debt.[26]

PLACE OF ANNUAL MEETING.

[It shall be lawful for any corporation of this State, now existing or hereafter created, to change the location of its principal office, the place of its annual and other meetings of stockholders, or the time for holding such annual meetings, or either, or all, by resolution of its board of directors, adopted by a two-thirds vote thereof, approved at any annual meeting or special meeting duly called of the stockholders, by a two-thirds vote thereof. Upon such approval of the stockholders, it shall be the duty of the president of such corporation to file in both the offices of the Secretary of the Commonwealth and the Auditor General of this Commonwealth a report, under the seal of the company, specifying the change or changes so made. Nothing in this act, however, shall authorize the location of the principal office or the holding of the annual or other meetings of stockholders outside of the limits of this Commonwealth.][27]

PART OF BOARD MAY BE ELECTED ANNUALLY.

[Whenever the stockholders of any corporation incorporated under the act of April twenty-ninth, one thousand eight hundred and seventy-four, or any other law of this

[26] The parts printed in italics were added by the Act of May 14, 1891, P. L. 61.

[27] Act of June 8, 1893, P. L. 355. It is not an amendment or supplement to the Act of 1874. The Acts of February 6, 1830, Section 2, P. L. 42, and May 31, 1887, P. L. 281, as far as they relate to changing the time of the annual meeting, are superseded by this act. The Act of 1830, *supra*, gives to the directors or trustees the power to change by a two-thirds vote the times of their own meetings.

By the Act of November 27, 1865. See Pamphlet Laws for 1866, p. 1228, provides that where the majority of the directors or stockholders are citizens of other States all meetings may be held out of the State, provided that the annual meeting for the election of officers be held within the State.

Commonwealth, shall, at a meeting called for the purpose, decide, by a majority vote of those present either in person or by proxy, to elect a portion of their directors for a term or terms longer than one year, it may and shall be lawful for such corporation, at the next ensuing election, to divide the directors or managers, which are to be chosen, into two, three or four classes, and to elect the first class to serve for the term of one year, and the second, third or fourth to serve for two, three or four years, respectively, and at all ensuing elections of said corporations, the stockholders shall only elect the number of directors necessary to take the place of those whose term of office shall then expire, and such directors shall be elected for the longest term for which any class may have been elected as hereinbefore provided.][28]

NUMBER OF DIRECTORS.

[In all corporations heretofore or hereinafter incorporated under the laws of this Commonwealth, and in all foreign corporations heretofore or hereafter domesticated under the laws of this Commonwealth, the board of directors may consist of any number of persons not less than three. The number of directors may be increased or diminished, from time to time, by the stockholders of any such corporations, at any regular annual meeting or at any special meeting called for that purpose, of which notice shall be given as required by the by-laws; and it shall be lawful for any such corporation, by its by-laws, to authorize the board of directors to increase or decrease the number of the directors from time to time without a vote of the stockholders.][29]

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[28] Act of June 17, 1887, Section 1, P. L. 411, a supplement to the Act of 1874. See note 21, *supra*.

[29] Act of April 19, 1901, P. L. 80. It is not an amendment or supplement to the Act of 1874.

The Act of May 31, 1887, P. L. 281, provides : "It shall be lawful * * * for any corporation * * * to determine by a vote of its stockholders, holding a majority in interest of all its stock, at a

QUORUM OF STOCKHOLDERS.

SECTION 6. Every such corporation may determine, by its by-laws, what number of stockholders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting to constitute a quorum; if the quorum is not so determined, a majority in interest of the stockholders shall constitute a quorum.

CERTIFICATES OF STOCK.

SECTION 7. [Any stockholder of any company incorporated under the laws of this Commonwealth shall be entitled to receive a certificate of the number of shares standing to his, her or their credit on the books of the corporation, which certificate shall be signed by the president or vice-president or other officer designated by the board of directors, countersigned by the treasurer and sealed with the common seal of the corporation, which certificate or evidence of stock ownership shall be transferable on such books at the pleasure of the holder, in person or by attorney, duly authorized as the by-laws may prescribe, subject, however, to all payments due or to become due thereon; and the assignee or party to whom the same shall have been so transferred shall be a member of said corporation and have and enjoy all the im-

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meeting duly called for the purpose * * * the number of directors that shall hereafter govern its affairs."

The Act of April 15, 1869, P. L. 29, provides: "Whenever the number of directors or managers of any corporation may be increased under authority of law, a majority of the whole number shall be necessary to constitute a quorum."

The Act of March 31, 1860, Section 66, P. L. 382, prohibits any director, trustee, etc., of any corporation from being a salaried officer of the corporation subordinate to the president or directors. But the Act of May 20, 1891, P. L. 101, permits a director of "any trust, deposit, or other purely private or business corporation," to serve as such salaried officer. The words "purely private" would seem to exclude public service corporations, and many corporations of the first class.

The Act of March 31, 1860, Section 67, P. L. 382, makes void any contract with a corporation for supplies or materials where the other party has given any officer of the company a reward to induce him to make the contract. The person giving the reward is guilty of a misdemeanor.

munities, privileges and franchises and be subject to all of the liabilities, conditions and penalties incident thereto, in the same manner as the original subscriber or holder would have been. *And upon a sale of such stock in satisfaction of any debt for which it is pledged the purchaser shall have the right to compel a transfer of such stock upon the corporation books and the delivery of a proper certificate therefor.*][30]

OATH OF OFFICERS HOLDING ELECTIONS.

SECTION 8. No person acting as judge or officer holding an election for any such corporation, shall enter on the duties of his office or appointment until he take and subscribe an oath or affirmation before a judge, alderman, justice of the peace, or other person qualified by law to administer oaths, that he will discharge the duties of his office or appointment with fidelity, that he will not receive any vote but such as he verily believes to be legal; and if any such judge or officer shall, knowingly and wilfully, violate his oath or affirmation, he shall be subject to all the penalties imposed by law upon the officers of the general election of this commonwealth violating their duties, and shall be proceeded against in like manner, and with like effect; and if any election, as aforesaid, be held without the person holding the same having first taken an oath or affirmation, as aforesaid, or be invalid for any other reason, such election shall be set aside in the manner now provided by law, and a new election ordered by the court of common pleas of the proper county, upon the petition of not less than five stockholders supported by proof satisfactory to said court.

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[30] This is the Act of June 24, 1895, P. L. 258. It is not in terms an amendment or supplement of Section 7 of the Act of 1874. The language is somewhat different, but the part printed in italics is the only part which is new.

The Act of 1874, after the words "in the same manner as the original subscriber or holder would have been," added "but no certificate shall be transferred so long as the holder thereof is indebted to said company, unless the board of directors shall consent thereto." Query, whether this proviso is still in force?

VACANCIES.

SECTION 9. In case of the death, removal, or resignation of the president or any of the directors, treasurer or other officer of any such company, the remaining directors may supply the vacancy thus created until the next election.

CUMULATIVE VOTING.

SECTION 10. In all elections for directors, managers or trustees of any corporation created under the provisions of this statute, or accepting its provisions, each member or stockholder *or other person having a right to vote*, may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates as he may prefer, that is to say: If the said member or stockholder *or other person having a right to vote*, own one share of stock or has one vote, or is entitled to one vote for each of six directors by virtue thereof, he may give one vote to each of said six directors, or six votes for any one thereof, or a less number of votes for any less number of directors, *whatever may be the actual number to be elected*, and in this manner may distribute or cumulate his votes as he may see fit; all elections for directors or trustees shall be by ballot, and every share of stock shall entitle the holder thereof to one vote, in person or by proxy, to be exercised as provided in this section.[31]

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[31] The parts printed in italics were added by the Act of April 25, 1876, P. L. 47.

The Act of May 26, 1893, P. L. 141, provides that the certificate of stock and transfer book, or either shall be *prima facie* evidence of the right to vote. Any stockholder may object that the registered owner is not the real owner. The question of ownership is determined summarily by the judge of election. Executors, administrators, guardians or trustees created by last will or testament, or by decree of court, can vote the stock standing in the name of the decedent [See also, Act of March 16, 1905, P. L. 42]. In other cases, the beneficial owner is the person entitled to vote, and as between the pledgor and pledgee, the pledgor is the person entitled except where by written agreement between them the pledgee has that right.

The Act of March 5, 1903, P. L. 14, regulates voting by proxy; while the Act of March 24, 1903, P. L. 50, provides, under certain conditions, for taking a stock vote on any question.

CAPITAL STOCK.

SECTION 11. The capital stock of every such corporation that has or requires a capital stock, shall consist of not more than one million dollars,[32] and shall be divided into shares of not more than one hundred dollars each; and all subscriptions to the capital stock shall be paid in such instalments and at such times as the directors may require, and if default be made in any payment the person or persons in default shall be liable to pay, in addition to the amount so called for and unpaid, at the rate of one-half of one per centum per month for the delay of such payment, and the directors may cause suit to be brought for the recovery of the amount due, together with the penalty of one-half of one per centum per month as aforesaid, or the directors may cause the stock to be sold in the manner provided in clause two of section thirty-nine of this act; and no stockholder shall be entitled to vote at any election, or at any meeting of the stockholders, on whose share or shares any instalments or arrearages may have been due and unpaid for the period of thirty days immediately preceding such election or meeting. The shares of the capital stock of every such company may be transferred on the books of the company, in person or by attorney, subject to such regulations as the by-laws may prescribe; but the provisions of this section shall not apply to corporations in which by this act different and other rules and provisions are enacted for their regulation and government.

SECTION 12. The stock of every corporation created under the provisions of this statute shall be deemed personal property; and no shares shall be transferable until all previous calls thereon shall have been fully paid in, or shall have been declared forfeited for the non-payment of calls

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[32] By the Act of May 9, 1889, P. L. 180, water companies may have a capital stock of two millions.

See, however, the power of all corporations to increase their capital stock to thirty millions of dollars, *infra*, Section 18, as effected by the Act of June 10, 1893, P. L. 417.

thereon.[33] No note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as a payment of any part of the capital stock. It shall and may be lawful for any corporation, organized under the provisions of this act either for the purpose of carrying on any manufacturing business, or for the supply of water, *or for the manufacture or supplying of light*, to subscribe for, take, purchase, hold, and dispose of the bonds or stock in any company of the same character incorporated under the provisions of this act or its supplements, or guarantee the payment of said bonds and the interest thereon, or either principal or interest, or to enter into contracts for the use or lease of the corporate property, real, personal or mixed, of such company, upon such terms as may be agreed upon with the company or companies owning the same, and to run, use and operate such property in accordance with such contract or lease.[34]

POWER TO MORTGAGE.

SECTION 13. It shall be lawful for all corporations to borrow money or to secure any indebtedness created by them, by issuing bonds, with or without coupons attached thereto, and to secure the same by a mortgage or mortgages to be given and executed to a trustee or trustees, for the use of the bondholders, upon their real estate and machinery, or on their real estate alone, to an amount not exceeding one-half of the capital stock of the corporation paid in, and at a rate of in-

[33] The Act of 1874 at this point provided: "And every corporation may, from time to time, at a legal meeting called for the purpose, assess upon each share of stock such sums of money as the corporation may think proper, not exceeding in the whole the amount at which each share was originally limited; and such sums assessed shall be paid to the treasurer at such times and in such instalments as the corporation directs." This provision was struck out by the Act of May 25, 1887, P. L. 273.

[34] The Act of 1874 expressly prohibited the purchase of stock of other corporations. This policy was reversed by the Act of June 26, 1895, P. L. 369. The Act of March 24, 1905, P. L. 56, which is substituted in the text for the 12th Section of the Act of 1874, is the Act of 1905, with the addition of the words printed in italics.

terest not exceeding six per centum: *Provided, That it shall be lawful for such corporations as belong to the classes named in clauses four, five, six, seven, nine and eleven of corporations for profit, of the second class, as set forth in section two of the act of which this is a supplement, and also for such corporations as belong to the class named in clause twenty-four, section two, of the act of Assembly approved April seventeenth, one thousand eight hundred and seventy-six, so to borrow money and so to secure the payment of the same, by a mortgage or mortgages on its property and franchises, to an amount not exceeding double the amount of the capital stock of the corporation actually paid in, and at a rate of interest not exceeding six per centum,* and this section shall not be construed to prevent mortgages for a greater amount and at a higher rate of interest, where the power to make the same is expressly given by the terms of this statute to certain classes of corporations, or is contained in the charter of any private corporations accepting this act, or in the statutes under which certain other classes thereof are by the provisions of this statute to be controlled, governed and managed.[35]

LIABILITY OF STOCKHOLDERS.

SECTION 14. The stockholders in each of said corporations shall be liable, in their individual capacity, to the amount of stock held by each of them, for all work or labor done to carry on the operations of each of each of [said] corporations; but this section shall not be construed to in-

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[35] The parts printed in italics were added by the Act of May 21, 1889. P. L. 257.

The Act of May 15, 1874, Section 1, P. L. 186, provided: "It shall and may be lawful for any corporation existing by or under the authority of any law of this commonwealth, which shall have mortgaged any part of its estate, corporate property and franchises, for the security of all or any portion of its bonded indebtedness, to mortgage its remaining estate, corporate property and franchises, or any part of the same, as a further and additional security for the same bonded indebtedness: *Provided however*, That no lien then existing upon such remaining estate, property and franchises, shall be thereby impaired or affected."

crease or diminish the liability of stockholders in corporations which, by the terms of this statute, are to be governed, controlled and managed by the provisions of other statutes, but their liability shall be fixed and defined by the terms of the statutes by which said corporations are to be governed, controlled and managed.[36]

SECTION 15. In any action or bill in equity, brought to enforce any liability under the provisions of this act, the plaintiff may include as defendants, any one or more of the stockholders of such corporation, claimed to be liable therefor; and if judgment be given in favor of the plaintiff for his claim, or any part thereof, and any one or more of the stockholders so made defendants, shall be found to be liable, judgment shall be given against him or them. The execution upon such judgment shall be first levied on the property of such corporation, if to be found in the county where the chief business of the corporation is carried on, and in case such property, sufficient to satisfy the same, cannot be found in said county, the deficiency, or so much thereof as the stockholder or stockholders, defendants, in such judgment, shall be liable to pay, shall be collected of the property of such stockholder or stockholders; on the payment of any judgment as aforesaid, or any part thereof, by one or more stockholders, the stockholder or stockholders so paying the same shall be entitled to have such judgment, or so much thereof as may have been paid by him or them, assigned to him or them for his or their benefit, with power to enforce the same in manner aforesaid, first against the company, and in case the amount so paid by him or them shall not be collected of the property of the corporation, then ratably against the other solvent stockholders, if any such there be, originally liable for the claim on which such judgment was obtained; but no stockholder shall be personally liable for

[36] This section was amended by the Act of April 17, 1876, Section 3, P. L. 32. The section as it stood in the Act of 1874 contained the words "or materials" after the words "labor done."

The statute of limitations in actions to enforce the liability of stockholders is six years. See Act of March 28, 1867, P. L. 48.

payment of any debt contracted by any such corporation, unless suit for the collection of the same shall be brought against such stockholder or stockholders within six months after such debt shall have become due.[37]

PREFERRED STOCK.

SECTION 16. Every corporation created under the provisions of this act, or accepting its provisions, may, with the consent of a majority in interest of its stockholders, obtaining at a meeting to be called for that purpose, of which public notice shall be given during thirty days in a newspaper of the proper county, issue preferred stock of the corporation, the holders of which preferred stock shall be entitled to receive such dividends thereon as the board of directors of the corporation may prescribe, payable only out of the net earnings of the corporation.[38]

PROPERTY MAY BE TAKEN FOR STOCK—DEFERRED STOCK.

SECTION 17. Every corporation created under the provisions of this act or accepting its provisions, may take such real and personal estate, mineral rights, patent rights and other property, as is necessary for the purposes of its organizations and business, and issue stock to the amount of the value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls or assessments; and in the charter and the certificates and statements to be made by the subscribers and officers of the corporation, such stock shall not be stated or certified as having been issued for cash paid into the company, but shall be stated or certified in this respect

[37] On the service of process in actions brought to charge the stockholders of any corporation with any of the debts of such corporations, or to enforce payments of instalments due upon stock, see Act of May 14, 1874, P. L. 146.

[38] Under the Act of April 3, 1872, P. L. 37, the interest on the preferred stock cannot be greater than twelve per cent. Query, whether this provision applies to an increase under the 16th Section of the Act of 1874? The Act of April 28, 1873, P. L. 79, amends the Act of April 3, 1872, P. L. 37, by permitting preferred stock to be issued in classes.

according to the fact; *and the executors or administrators of any deceased tenant in common of lands, mines and mineral rights so proposed to be taken may, and they are hereby authorized, to convey the individual estate and interest of such decedent therein to such company, receiving therefor so much stock in such company as the said decedent would have been entitled to receive in his lifetime, to be held in the same manner as the lands: Provided, That no directions or limitations contained in any last will and testament of such decedent shall be in any manner interfered with: And provided, That before making such conveyance, such executors or administrators shall give sufficient security, to be approved by the orphans' court having jurisdiction of their accounts, for the faithful application of the stock received therefor;* no such corporation shall issue either bonds or stock except for money, labor done or money or property actually received, and all fictitious increase of stock or indebtedness in any form shall be void; every such corporation may provide for the issue of deferred stock in payment for such real or personal estate or mineral rights, and if so provided, it shall be expressly stated in the charter filed, or in a certificate to be made and recorded, or in the acceptance of this statute, to be filed by any corporation accepting its provisions, with the amount of such deferred stock, and the consideration of the same, and the terms on which the same shall be issued; and the said stock may be made to await payments of dividends thereon, until out of the net earnings at least five per centum has been declared and paid upon the other full paid stock of the corporation.[39]

INCREASE OF CAPITAL STOCK.[40]

[SECTION 1. The capital stock or indebtedness, or both, of any corporation created by general or special law may, with the consent of the persons or bodies

[39] The words printed in italics were added by the Act of April 17, 1876, Section 4, P. L. 32.

[40] This was the subject of Sections 18-22 inclusive, of the Act of

corporate holding the larger amount in value of its stock, be increased to such an amount in the aggregate of each, *without regard to the amount of the other, and regardless of any limitation upon the amount of either, prescribed in any general or special law regulating any such corporation,* as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of such corporation. Such increase of either may be made at once or from time to time, as the majority in interest of the stockholders shall determine, as aforesaid; *and upon the authorizing of any such increase of indebtedness by the stockholders of such corporation, in the manner hereinafter provided, it shall be lawful for such corporation to secure the payment of the principal or interest, or both, of all or any part of such indebtedness by mortgage, deed of trust, or other pledge or conveyance, by way of security, of all or any part of its real and personal property, rights, privileges, and franchises, and in such manner and upon such terms as its board of directors may determine.*[41]

[SECTION 2. That any corporation desirous of increasing its capital stock or indebtedness, or both, as authorized by this act, shall by resolution of its board of directors, adopted by a majority of the entire number thereof, declare such purpose, and thereupon by resolution, similarly adopted, direct that the question of such proposed increase

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1874, which is now superseded by Act of February 9, 1901. See, 41 *infra*. Section 18 provided that the holders of the larger amount in value of the stock could increase the "capital stock or indebtedness" to such an amount as such corporation is by this act authorized to increase its "capital stock or indebtedness." In the Act of 1874 the usual limit was two millions, though special kind of corporations, as mechanical, mining, manufacturing, or other business, in Clause XVIII of the second class, could have a capital stock of five millions, while the real estate companies were confined to a capital stock of two hundred thousand dollars. The Act of June 10, 1893, P. L. 417, provided that any corporation created by a general or special law could have a capital stock not exceeding thirty millions.

[41] This and the next three sections are of the Act of February 9, 1901, P. L. 3. Section 1 has been amended by the Act of April 22, 1905, P. L. 280. The parts printed in italics were added by the amending act.

shall be submitted to the stockholders of such corporation for their consent; either,

(A). At any prescribed regular annual meeting or adjournment thereof, the notice whereof, stating *inter alia* that such subject would be considered thereat, shall have been published once a week for sixty days prior to such meeting in at least one newspaper published in the county, city or borough wherein the chief office or place of business of the corporation is situate. At said meeting the question shall be submitted to the stockholders, and it shall be the duty of the president and secretary of said meeting, by such agencies or methods as to them may seem meet, to ascertain whether the persons and bodies corporate holding the larger amount in value of the stock of said corporation shall have consented to such increase, and upon being so satisfied to certify in duplicate the fact, under oath duly administered: Provided, That should a stock vote be duly demanded at said meeting, it shall be the duty of the president and secretary, in ascertainment of the fact of the consent, to cause such vote to be taken at the same time and place, by the same persons and in the same manner, as the vote for directors or managers of such corporation shall be taken; or,

(B). At a special meeting of the stockholders, notice of the time, place and object of which shall have been published once a week for sixty days prior to said meeting in at least one newspaper published in the county, city or borough wherein such office or place of business is situated. At such meeting thus called, or any adjournment thereof, an election of the stockholders shall be taken for or against such increase, which shall be conducted by three judges, stockholders of such corporation, appointed by the board of directors to hold said election, and if one or more of said judges be absent the judge or judges present shall appoint a judge or judges who shall act in the place of the judge or judges absent; and said judges shall respectively take and subscribe an oath or affirmation before an officer author-

ized by law to administer the same, well and truly and according to law to conduct such election to the best of their ability; and the said judges shall decide upon the qualifications of voters, and when the election is closed count the number of shares voted for and against such increase, and declare whether the persons and bodies corporate holding the larger amount of the stock of such corporation have consented to such an increase or refused to consent thereto, and shall make out duplicate returns of said election, stating the number of shares of stock that voted for such increase and the number that voted against such increase, and subscribe and deliver the same to one of the chief officers of said company. Each ballot shall have endorsed thereon the number of shares thereby represented, but no share or shares transferred within sixty days shall entitle the holder or holders thereof to vote at such election or meeting; nor shall any proxy be received, or entitle the holder to vote, unless the same shall bear date and have been executed within four months next preceding such election or meeting; and it shall be the duty of such corporation to furnish the judges, at said meeting, with a statement of the amount of its capital stock, with the names of persons or bodies corporate holding the same, and number of shares by each respectively held, which statement shall be signed by one of the chief officers of such corporation, with an affidavit thereto annexed that the same is true and correct to the best of his knowledge and belief.

[SECTION 3. That it shall be the duty of such corporation, if consent is given to such increase, to file in the Office of the Secretary of the Commonwealth, within thirty days after such election, one of the copies of the certificates of the president and secretary of the annual meeting, or one of the copies of the return of such election at the special meeting hereinbefore provided for, with a copy of the resolution and notice calling the same thereto annexed; and thereafter the increase may be made at such time or times as shall be determined by the directors. Upon the actual increase

of the capital stock or indebtedness of such corporation, made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase actually made, and concurrently therewith such corporation shall pay to the State Treasurer, for the use of the Commonwealth, such bonus on the actual increase shown by said return as shall then be prescribed by law. In case of neglect or omission to make said return, such corporation shall be subject to a penalty of five thousand dollars, in addition to the bonus, which penalty shall be collected on an account settled by the Auditor General and State Treasurer as accounts for taxes due the Commonwealth are settled and collected; and the Secretary of the Commonwealth shall cause said return to be recorded in a book for that purpose and furnish a copy of the same to the Auditor General.

[Section 4. Nothing in this act contained shall be construed as compelling resort to the process herein provided in the case of indebtedness contracted in the usual course of corporation business. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed: Provided, however, That any proceeding for increase of capital stock or indebtedness, begun under existing law prior to and not completed at the date this act becomes effective, shall be consummated under the authority of this act if the antecedent proceeding shall have conformed to its requirements; but if such antecedent proceeding shall not have so conformed, then the proceeding shall be consummated under the provisions of the law existing prior to the passage of this act: Provided, however, That the provisions of this act shall inure to the benefit of any railroad, canal or other transportation corporation, unless such railroad, canal or other transportation corporation shall, before claiming or using the benefits of this act, file in the office of the Secretary of the Commonwealth an acceptance of all the provisions of article seventeen of the Constitution of this

Commonwealth, which acceptance shall be made by resolution adopted at a regular or called meeting of the directors, trustees or other proper officers of such railroad, canal or other transportation corporation, certified under the seal of the corporation, and a copy of which resolution, certified under the seal of the Office of the Secretary of the Commonwealth, shall be evidence for all purposes.][42]

CAPITAL STOCK MAY BE REDUCED.[43]

[SECTION 1. The capital stock of any corporation *created by general or special law* may be reduced, from time to time, by the consent of the persons or bodies corporate holding the larger amount in value of the stock of such corporation, provided that such reduction shall not be below the minimum amount of capital stock required by law for the formation of *corporations formed for similar purposes.*[44]

[SECTION 2. That any corporation desirous of reducing its capital stock as provided by this act shall, by a resolution of its board of directors, call a meeting of its stockholders therefor, which meeting shall be held in its chief office or place of business in this Commonwealth, and notice of the time, place and object of said meeting shall be published once a week for sixty days prior to such meeting in at least one newspaper published in the county, city or borough wherein such office or place of business is situate.

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[42] The Act of April 18, 1874, P. L. 61, also provided for an increase in capital stock. Section 6 of this act requires that, when requested by the Auditor General, a report of the amount of the increase "issued pursuant to the provisions of this Act" shall be rendered.

[43] Provision for the reduction of capital stock was made in Section 23 of the Act of 1874. This section was amended by the Act of April 17, 1876, Section 5, P. L. 33. The amendment added a provision for the sale of the property and franchises of a corporation, but followed the language of the Act of 1874 in dealing with the reduction of stock. The Act of June 8, 1893, P. L. 351, which is printed in the text, while it did not in terms repeal that part of Section 23 of the Act of 1874 which relates to reduction of stock, completely supplies its place. The first section of the Act of 1893 was itself amended by the Act of April 22, 1905, as noted *infra.*

[44] This and the next four sections is the Act of June 8, 1893, P. L. 351. The first section was amended by the Act of April 22, 1905, P. L. 264. The words printed in italics were added by the amending act.

[SECTION 3. At the meeting called pursuant to the second section of this act, an election of the stockholders of such corporation shall be taken for or against such reduction, which shall be conducted by three judges, stockholders of said corporation, appointed by the board of directors to hold said election, and if one or more of said judges be absent, the judge or judges present shall appoint a judge or judges who shall act in the place of the judge or judges absent, and who shall respectively take and subscribe an oath or affirmation before an officer authorized by law to administer the same well and truly and according to law, to conduct such elections to the best of their ability, and the said judges shall decide upon the qualification of voters, and when the election is closed, count the number of shares voted for and against such reduction, and declare whether the persons or bodies corporate holding the larger amount of the stock of such corporation have consented to such reduction or refused to consent thereto, and shall make out duplicate returns of said election, stating the number of shares of stock that voted for such reduction and the number that voted against such reduction, and subscribe and deliver the same to one of the chief officers of said company.

[SECTION 4. Each ballot shall have endorsed thereon the number of shares thereby represented, but no share or shares transferred within sixty days shall entitle the holder or holders thereof to vote at such election or meeting, nor shall any proxy be received or entitle the holder to vote unless the same shall bear date and have been executed within three months next preceding such election or meeting, and it shall be the duty of such corporation to furnish the judges at said meeting with a statement of the amount of its capital stock with the names of persons or bodies corporate holding the same, and number of shares by each respectively held, which statement shall be signed by one of the chief officers of such corporation with an affidavit thereto annexed that the same is true and correct to the best of his knowledge and belief.

[SECTION 5. That it shall be the duty of such corporation, if consent is given to such reduction, to file in the office of the Secretary of the Commonwealth, within thirty days after such election or meeting, one of the copies of the return of such election provided for by the third section of this act with a copy of the resolution and notice calling the same thereto annexed, and upon the reduction of the capital stock of such corporation made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such reduction, and in case of neglect or omission so to do, such corporation shall be subject to a penalty of five thousand dollars, which penalty shall be collected on an account settled by the Auditor General and State Treasurer as accounts for taxes due the Commonwealth are settled and collected, and the Secretary of the Commonwealth shall cause said return to be recorded in a book kept for that purpose and furnish a certified copy of the same to the Auditor General.]

LIMIT OF LIABILITIES.

SECTION 24. That the officers and stockholders of corporations organized under or accepting the provisions of this act shall not be individually liable for the debts of said corporation otherwise than in this provided.

CONSTRUCTION OF GRANT OF POWER.

SECTION 25. The incorporation of any association of persons for the purposes named in this act, or accepting the same, shall be held and taken to be of the same force and effect as if the powers and privileges conferred, and the duties enjoined, had been conferred and enjoined by special act of the legislature, and the franchises granted shall be construed according to the same rules of law and equity as if it had been created by special charter, and no modification or repeal of this act shall affect any franchise obtained under the provisions of the same.

RETURN TO AUDITOR GENERAL.[45]

SECTION 26. Hereafter no institution or company, incorporated or organized by or under any law of this commonwealth, general or special, or incorporated or organized under the laws of any other state and doing business in this commonwealth shall go into operation without first having the name of the institution or company, the date of incorporation or organization, the act of assembly or authority under which incorporated or organized, the place of business, the post office address, and names of the president, secretary and treasurer, the amount of capital authorized by its charter, and the amount of capital paid into the treasury of the company, registered in the office of the auditor general; and every institution or company now engaged in business in this commonwealth shall, within ninety days after the passage of this act, register as herein required in the office of the auditor general; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and state treasurer, in the same manner as taxes on stock are settled and collected.[46]

CORPORATIONS ACCEPTING.

Any corporation or corporations for any of the purposes named and covered by the provisions of this act, heretofore created by any special act *or acts,* or in existence under the provisions of any general law of this commonwealth, shall be entitled to all the privileges, immunities, franchises and powers conferred by this act upon corporations to be created under the same, upon filing in the office of the sec-

[45] In the Act of 1874, the first part of Section 26 dealt with this subject, though "confining the requirements regarding notice to the Auditor General to corporations of the second class." This part of the section was re-enacted by the Act of April 17, 1876, Section 6, P. L. 33. But the Act of June 7, 1879, Section 1, printed in the text, seems to completely covers the subject.

[46] Act of June 7th, 1879, Section 1, P. L. 112.

retary of the commonwealth a certificate of a single corporation, *or a joint certificate if two or more corporations incorporated for and doing the same kind of business,* under the seal *or seals* of said corporation *or corporations,* accepting the provisions of the constitution and of this act, *duly authorized by a meeting of stockholders called for that purpose;* and upon such acceptance and approval by the governor, he shall issue letters patent to said corporation, *or if two or more corporations, to said corporations as one corporation, under such name as shall be designated by said corporation or corporations in said single or joint certificate, together with the amount and capital, number of shares and par value thereof, as shall be designated by said corporation or corporations in said certificate: Provided, That where two or more corporations shall make a joint certificate as aforesaid, and letters patent shall be issued to said new corporation, said corporations shall thenceforth be deemed, held and taken to be merged and consolidated, and be subject to all the limitations and liabilities of this act.*[47]

RE-CHARTERING CORPORATIONS.

SECTION 40. Corporations created by or under the laws of this state, embraced within either of the classes named in section two of this act, the charters whereof are about to expire by lapse of time from their own limitation, may be re-chartered, or the charters thereof renewed, under the provisions of this act, by preparing, having approved and recorded the certificate named in said section for the class of corporation of which the same is one, in addition to the requirements provided in this act for a new corporation; the certificate for a re-charter shall state the fact that it is a renewal of the former charter, naming the corpora-

[47] This is the last part of Section 26 of the Act of 1874 as it was amended by Section 6 of the Act of April 17, 1876, P. L. 33. The parts printed in italics were added by the later act.

Sections 27 to 39 inclusive, not applying to all corporations, either of the first or second class, incorporated under the Act of 1874 or its supplements, are omitted.

tion and the date of its first charter. It shall also be accompanied with a certificate, under the seal of the corporation, showing the consent of at least a majority in interest of such corporation to such re-charter. It shall also state the financial condition of the said corporation at the date of such certificate, showing capital stock paid in, funded debt, floating debt, estimated value of property and cash assets, if any. It shall expressly accept the provisions of the constitution of this state and of this act, and expressly surrender all privileges conferred upon such corporation by its original charter that are not enjoyed by corporations of its class under this act or general laws of this commonwealth. From the date of recording of such certificate, if the corporation be of the first class named in section two of this act, and from the date of letters patent, if of the second class, the said re-chartered corporation shall be and exist as a new corporation under the provisions of this act and of its said renewed charter; and all of the rights, privileges, powers, immunities, lands, property and assets, of whatever kind or character the same may be, possessed and owned by the said original corporation, shall vest in and be owned and enjoyed by the said re-chartered corporation, as fully and with like effect as if its original charter had not expired, save as herein and by said certificate expressly stated otherwise; and all suits, claims and demands by said corporations in existence at the date of such re-charter, shall and may be sued, prosecuted and collected, under the laws governing the said corporation prior to its re-charter, and all claims and demands of every nature and character in existence at said re-charter, may be collected from and off the said re-chartered corporation, as fully and with like effect as if no change had taken place.[48]

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[48] Section 41, not applying to all corporations incorporated under the Act of 1874 or its supplements, is omitted.

AMENDMENTS TO CHARTERS—CORPORATIONS OF THE FIRST CLASS.

SECTION 42. As often as the corporations named in the first class, specified in the second section of the act *to which this is a supplement,* including all such corporations now in existence, *and academies,* colleges and universities, shall be desirous of improving, amending or altering the articles and conditions of their charters, it shall and may be lawful for such corporations, respectively, in like manner to specify the improvements, amendments or alterations which are or shall be desired, and exhibit the same to the court of common pleas of the proper county in which said corporation is situated as aforesaid, where [when], if said court shall be of opinion such alterations are or will be lawful and beneficial, and do not conflict with the requirements of the statute *to which this is a supplement* or of the constitution, it shall be the duty of said court to direct notice to be given, as provided in the third section of the act *to which this is a supplement,* of such application, and after decree made and such amendments are recorded, the same shall be deemed and taken to be a part of the charter of the said corporation; *and if any two or more such corporations shall desire to consolidate and merge with each other, or one or more within the other, upon application to the court of common pleas of the county in which the corporation is situated, into which the one or more desire to merge or become consolidated with the same, proceedings shall take place as are required on an application to amend; and upon decree being made by said court, and the same being recorded in said county, upon the terms specified in said application, the said corporations, with all their rights, privileges, franchises, powers and liabilities, shall merge and be consolidated into, by the name, style and title given to the same in such decree, and upon the terms, limitations and with the powers stated and conferred in said application and decree.*[49]

[49] This is Section 42 of the Act of 1874, as amended by the Act of April 17, 1876, Section 12, P. L. 37. The parts printed in italics were added by the amending act.

AMENDMENTS TO CHARTERS—CORPORATIONS OF THE SECOND CLASS.[50]

[SECTION 1. When any corporation, formed for any of the purposes named in the second class of section two of the act to which this is a supplement, or embraced in that class by any of its supplements, and which shall have been or may hereafter be incorporated under the provisions of that act or its supplements, as also any corporation of the second class which has heretofore or may hereafter accept the provisions of said act and the several supplements thereto, and the Constitution of this Commonwealth in the manner provided by law, shall desire to improve, amend or alter the article and conditions of the charter or instrument upon which said corporation is formed and established, it shall and may be lawful for such corporation to apply to the Governor of this Commonwealth for such improvement, amendment or alteration in the manner provided by this act.

[SECTION 2. The corporation desiring such improvement, amendment or alteration shall give notice of the intention to apply therefor, in two newspapers of general circulation, printed in the county wherein the principal office or place of business of said corporation is located, once a week for three weeks, setting forth briefly the character and objects of the desired improvements, amendments or alterations, and the intention to make application therefor.

[SECTION 3. The said corporation shall prepare a certificate, under its corporate seal, setting forth the character and objects of the proposed improvement, amendment or alteration of their charter, or the instrument upon which the said corporation is formed or established; *also, that all reports required by the Auditor General of the Commonwealth have been filed, and that all taxes due the Commonwealth of Pennsylvania have been paid;* acknowledged by

[50] The Act of 1874 did not deal with this subject. The provision in the text is the supplement of June 13, 1883, P. L. 122, amended as indicated *infra*, note 51.

the president and secretary of said corporation and before the recorder of deeds of the county wherein such corporation has its principal office or place of business; which certificate, together with proof of publication of notice, as provided *in section two of the supplement to an act of which this is an amendment,* shall then be produced to the Governor of the Commonwealth, who shall examine the same, and, if he find it to be in proper form, and that such improvements, amendments or alterations are or will be lawful and beneficial, and not injurious, to the community, and are in accord with the purpose of the charter, *and that all reports required by the Auditor General of the Commonwealth have been duly filed, and that all taxes due the Commonwealth of Pennsylvania have been paid,* he shall approve thereof and endorse his approval thereon, and direct letters patent to issue, in the usual form, reciting the said improvements, amendments or alterations; and the said certificate shall then be recorded in the office of the Secretary of the Commonwealth, and, with all its endorsements, shall then be recorded in the office for the recording of deeds in and for the proper county, where the principal office or place of business of said corporation is located; and from thenceforth the same shall be deemed and taken to be a part of the charter or instrument upon which said corporation was formed or established, to all intents and purposes, as if the same had originally been made a part thereof: Provided, That nothing herein contained shall authorize the amendment, alteration, improvement or extension of the charter of any gas or water company, so as to interfere with or cover territory previously occupied by any other gas or water company.[51]

[Section 4. Nothing in this act contained shall be construed to repeal or authorize the repeal of any of the requirements or restrictions of the said act of April twenty-

[51] This is Section 3 of the Act of June 13, 1883, P. L. 123, as amended by the Act of the 31st of March, 1905, P. L. 93. The words printed in italics are those added by the amending act.

ninth, one thousand eight hundred and seventy-four and its supplements, nor to dispense with any of the provisions of the said act, nor to authorize the right of eminent domain to be given to any corporation by amendment of its charter, nor to permit any change in the objects and purposes of such corporation as shown by its original charter.][52]

BONUS.[53]

[SECTION 1. All corporations hereafter created under any general or special law of this Commonwealth, except building and loan associations, and excepting all corporations named in the first class of section two of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four, shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-third of one per centum upon the amount of the capital stock which said company is authorized to have, and a like bonus on any subsequent authorized increase thereof, and a like bonus shall be paid by all such companies heretofore incorporated upon any increase of their capital stock hereafter authorized. And no company as aforesaid shall have or exercise any corporate powers until the said bonus is paid, and the Governor shall not issue letters patent to any company until he is satisfied that the said bonus has been paid to the State Treasurer. And no company incorporated as aforesaid shall go into operation, or exercise any corporate powers or privileges, until said bonus has been paid. The Secretary of the Commonwealth shall not permit the filing in his office of any proceedings for increase of capital stock until he is satisfied

[52] Section 50 of the Act of 1874, not relating to all corporations either of the first or second class, is omitted.

[53] This was the subject of Section 44 of the Act of 1874. The section was amended by the Act of May 22, 1878, P. L. 97, and again amended by the Act of June 15, 1897, P. L. 155. In the second amending act the section was stated for the purpose of amendment as it stood in 1874, the amendment of 1878 being ignored. The addition to the law by the amendment of 1878 failed, therefore, to be re-enacted.

that the said bonus upon said authorized increase has been paid to the State Treasurer.][54]

SECTION 45. It shall be the duty of the Secretary of the Commonwealth, *every two years,* to prepare and publish, *in separate pamphlet form,* a certified list of all charters of incorporations filed in his office, and incorporated under the provisions of this act, stating the style, title, purpose and location of every such corporation, and he shall prepare and publish a complete alphabetical index to the same.[55]

The Act of May 3, 1899, Section 1, P. L. 189, which is printed in the text, though it does not purport to be an amendment or supplement to the Act of 1874, covers the entire subject, and has apparently supplied Section 44 of the Act of 1874 and its amendments.

[54] Act of May 3, 1899, Section 1, P. L. 189. The Act of April 18, 1874, Section 7, P. L. 62, provides: "That every company, except railroad, canal, turnpike, bridge or cemetery companies, and companies incorporated for literary, charitable or religious purposes, which shall increase its capital stock under the provisions of this act shall pay to the state treasurer, for the use of the commonwealth, a bonus of one-quarter of one per centum upon the amount of said increase, in two instalments, the first to be due upon the filing of the certificate required by the preceding section of this act, to be filed in the office of the secretary of the commonwealth, and the second instalment one year thereafter: *Provided,* That nothing in this act shall be construed to reduce the amount of bonus to be paid by any company having in its charter a special provision requiring the payment of a bonus at a higher rate than one-quarter of one per centum."

[55] The parts printed in italics were added by the Act of June 7, 1901, P. L. 530. The Act of 1901 also provides for the distribution of the publication.

The Act of June 13, 1883, Section 7, P. L. 122, provides that the Act of 1874 "shall hereafter be cited and known as the Corporation Act of 1874."

LAWS RELATING TO ALL CORPORATIONS, EITHER OF THE FIRST OR SECOND CLASS OR BOTH, DEALING WITH SUBJECTS FOR WHICH NO PROVISION WAS MADE IN THE ACT OF 1874.[1]

ORGANIZATION.

Any corporation of the second class, created under the provisions of the act to which this is a supplement, or any of its supplements, that shall not within two years from the date of its letters patent proceed in good faith to organize and to do the things contemplated by its charter, and have paid up at least one-fourth of its capital stock, shall be held and deemed to have forfeited its charter, and the Attorney General shall, on the application of any citizen, take the proper legal steps to forfeit and vacate its said charter, but any corporation now in existence shall have two years from the date of this act to do and perform the things by this section required.[2]

CHANGE OF PAR VALUE OF SHARES.[3]

SECTION 1. It shall be lawful for any corporation, organized under the laws of this State, to change the par value or face value of the shares into which its capital stock is divided. Such change shall be authorized by a vote of a majority of the stockholders of any such company, present in person or by proxy at any annual meeting, or any special meeting duly called for that purpose. Such change of the par value of the capital stock shall not be taken to increase or diminish, or change in any way, the total aggregate par value of the capital stock which said company may be authorized to issue or may have issued, but only to change the number of shares into which the same may be divided.

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[1] Omits laws relating to suits against corporations, execution and taxation.

[2] Act of June 13, 1883, Section 5, P. L. 123.

[3] Act of July 2, 1901, P. L. 606.

SECTION 2. In case the stockholders, so present at such meeting, shall vote to increase or diminish the par value of the shares of the capital stock of the company, as above provided, it shall be the duty of the proper officers of the company to file a certificate of the fact in the office of the Secretary of the Commonwealth, under the seal of the corporation; and thereupon the proper officers of such corporation shall issue to the stockholders the proper number of shares of the capital stock of the new par value, in exchange for outstanding shares of the former par value, upon the surrender of such outstanding shares by the respective holders and the cancellation thereof.

MERGER AND CONSOLIDATION.[4]

SECTION 1. It shall be lawful for any corporation now or hereafter organized under, or accepting the provisions of, the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, or of any of the supplements thereto, or of any other act of Assembly authorizing the formation of corporations, to buy and own the capital stock of, and to merge its corporate rights, powers and privileges with and into those of, any other corporation, so that by virtue of this act such corporations may consolidate, and so that all the property, rights, franchises and privileges then by law vested in either of such corporations, so merged, shall be transferred to and vested in the corporation into which such merger shall be made: Provided, That nothing in this act shall be construed so as to permit railroad, canal, telegraph companies, which own, operate or in any way control parallel or competing roads, canals or lines, to merge or combine: And provided further, That any corporation formed for the purpose of carrying on any manufacturing business under the seventeenth or eighteenth clause of section two of an act entitled

[4] Act of May 29, 1901, P. L. 349.

"An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, with the powers conferred by section thirty-eight or section thirty-nine of said act, may be merged and consolidated, under the provisions of this act, with any other corporation formed for any purpose provided for in either the seventeenth or eighteenth clause of section two of the act above cited; but nothing in this act contained shall extend or enlarge beyond its former territorial limits the exclusive franchise of any gas or water company.

SECTION 2. Said merger or consolidation shall be made under the conditions, provisions and restrictions, and with the powers herein set forth, to wit:

I. The directors of each corporation may enter into a joint agreement, under the corporate seal of each corporation, for the merger and consolidation of said corporations; prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers and their places of residence, the number of shares of the capital stock, the amount or par value of each share, and the manner of converting the capital stock of each of said corporations into the stock of the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect the said consolidation and merger; but said agreement shall not be effective unless the same shall be approved by the stockholders of said corporations, in the manner hereinafter provided.

II. Said agreement shall be submitted to the stockholders of each of said corporations, at separate special meetings, of the time, place and object of which respective meetings due notice shall be given by publication, once a week for two successive weeks before said respective meetings, in at least one newspaper in the county or each of the counties in which

the principal offices of said respective corporations shall be situate; and at said meetings the said agreement of the directors shall be considered, and a vote of the stockholders in person or by proxy shall be taken, by ballot, for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote, and if a majority in amount of the entire capital stock of each of said corporations shall vote in favor of said agreement, merger and consolidation, then that fact shall be certified by the secretary of each corporation, under the seal thereof, and said certificates, together with the said agreement or a copy thereof, shall be filed in the office of the Secretary of the Commonwealth, whereupon the said agreement shall be deemed and taken to be the act of consolidation of said corporations.

Section 3. Upon the filing of said certificates and agreement, or copy of agreement, in the office of the Secretary of the Commonwealth, the said merger shall be deemed to have taken place and the said corporations to be one corporation under the name adopted in and by said agreement, possessing all the rights, privileges and franchises theretofore vested in each of them, and all the estate and property, real and personal, and all the rights of action of each of said corporations, shall be deemed and taken to be transferred to and vested in the said new corporation, without any further act or deed: Provided, That all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts, duties and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation, and may be enforced against it to the same extent and by the same process as if said debts, duties and liabilities had been contracted by it. But such merger and consolidation shall not be complete, and no such consolidated corporation shall do any business of any kind, until it shall have first obtained from the Governor of the Commonwealth new Letters Patent, and shall have paid

to the State Treasurer a bonus of one-third of one per centum on all its corporate stock in excess of the amount of the capital stock of the several corporations so consolidating, upon which the bonus required by law had been theretofore paid: *And provided further, That new letters patent of such consolidated corporation shall not be issued by the Governor of the Commonwealth until each and every corporation, entering and forming the consolidated corporation, shall have filed with the Secretary of the Commonwealth a certificate from the Auditor General of the Commonwealth, setting forth that all reports required by the Auditor General of the Commonwealth have been duly filed, and that all taxes due the Commonwealth of Pennsylvania have been paid.*[5]

SECTION 4. A certified copy of said certificate and agreement, or copy of agreement, so to be filed in the office of the Secretary of the Commonwealth, shall be evidence of the lawful holding and action of such meetings, and of the merger and consolidation of said corporations.

SECTION 5. If any stockholder or stockholders of any corporation which shall become a party to an agreement of merger and consolidation hereunder, shall be dissatisfied with or object to such consolidation, and shall have voted against the same at the stockholders' meeting, it shall and may be lawful for any such stockholder or stockholders, within thirty days after the adoption of said agreement of merger and consolidation by the stockholders as herein provided, and upon reasonable notice to said corporation, to apply by petition to any court of common pleas of the county in which the chief office of such corporation may be situate, or to a judge of said court in vacation, if no such court sits during said period, to appoint three disinterested persons to estimate and appraise the damages, if any, done to such stockholder or stockholders by said consolidation. Upon such petition, it shall be the duty of said court, or

[5] The words in italics were added by the Act of March 31, 1905, P. L. 95.

judge, to make such appointment; and the award of the persons so appointed, or of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons so appointed shall also appraise the share or shares of said stockholders in the said corporation, at the full market value thereof, without regard to any appreciation or depreciation in consequence of the said consolidation, which appraisement, when confirmed by the said court, shall be final and conclusive; and the said corporation may, at its election, either pay to the said stockholder or stockholders the amount of damages so found and awarded, if any, or the value of the stock so ascertained; and upon the payment of the value of the stock as aforesaid, the said stockholder or stockholders shall transfer the stock so held by them to the said corporation, to be disposed of by the directors thereof or to be retained for the benefit of the other stockholders; and in case the value of said stock, as aforesaid, shall not be so paid within thirty days after the said award shall have been confirmed by said court, the damages so found and confirmed shall be a judgment against said corporation, and may be collected as other judgments in said court are by law recoverable.

CHANGE OF NAME.

It shall be lawful for the several courts of common pleas of this Commonwealth to change the name, style and title of any corporation of the class named in the first section of this act [corporations not for profit] within their respective counties, with the same proceedings and in the same manner as they are now authorized to improve, amend or alter the charters of such corporations.[6]

It shall be lawful for any corporation of this Commonwealth, heretofore or hereafter created by any general or special law, to change its corporate title by resolution of its Board of Directors, adopted by a two-thirds vote

[6] Act of May 2, 1899, Section 2, P. L. 160. The first section of the act validates certain changes of names heretofore made.

thereof, approved at any annual meeting, or special meeting duly called, of the stockholders by a two-thirds vote thereof. Upon such approval by the stockholders, it shall be the duty of the President of said corporation to file in the office of the Secretary of the Commonwealth a certificate, under the seal of the company, setting forth the resolution adopted by the Board of Directors and approved by the stockholders, the date of the adoption of such resolution by the Board of Directors and the date of its approval by the stockholders, the date of the original incorporation of the company, the act of Assembly under which the said corporation was created, the name under which the said corporation was originally incorporated and all subsequent changes therein, and the name which the corporation desires to adopt. The Secretary of the Commonwealth shall examine the records in his office, and, if he find that the name desired by said corporation does not conflict with the name of any corporation appearing upon said records, he shall require the said certificate to be recorded, and shall issue to the said corporation a certificate, under his hand and the seal of his office, granting to said corporation the use of said new corporate title. The Secretary of the Commonwealth shall, upon the issuing of any such certificate, require the same to be recorded in a book kept for that purpose, and certify the said change in the corporate title to the Auditor General of this Commonwealth: Provided, That any corporation, required to record the original certificate of incorporation in the office for the recording of deeds, shall, before being entitled to use the new corporate title, record in the office for the recording of deeds, where the original certificate of incorporation was recorded, the said certificate granted by the Secretary of the Commonwealth authorizing the use of the new corporate title: Provided also, That this act shall not apply to corporations not for profit.[7]

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[7] Act of April 22, 1903, Section 1, P. L. 251.

CERTAIN RIGHTS AND DUTIES.

(a) Obligations to be redeemable in gold and silver.

It shall not be lawful for any corporation within this commonwealth, directly or indirectly, either by itself or through any agent or agents, individual or individuals, to make, issue, re-issue, pay out or circulate, or cause to be issued, re-issued, put out or circulated, any certificate, check, order or due bill, or acknowledgment of indebtedness of any description for any purpose whatsoever, payable or redeemable in any goods, property or effects, or payable or redeemable in anything except in gold and silver, and that any violation of the provisions of this act shall be held and deemed to be a forfeiture of the charter of any company so offending, and any private citizen may by quo warranto proceed, according to law, to have such forfeiture declared: *Provided,* That this act shall not be construed to authorize any corporation or individual, not expressly authorized by existing laws, to issue any note, bill, check or certificate whatever, in the nature or similitude of a bank note, and intended for circulation; and that all laws inconsistent with this act, be and the same are hereby repealed: *And provided further,* That this section shall not be construed so as to prevent any corporation from drawing orders in the ordinary course of business, not intended for circulation, or in payment of interest, and that such orders shall not be negotiable.[8]

(b) Corporations for profit may pension employees.

Corporations organized for profit may, out of the earnings of said corporations, grant allowances or pensions to employés for faithful and long continued service, who have, in such service, become old, infirm or disabled: *Provided,* That the provisions of this act shall not apply to any director or officer of any such company or corporation.[9]

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[8] Act of April 21, 1849, Section 1, P. L. 673.
[9] Act of May 11, 1893, Section 1, P. L. 42.

(c) Payments of dividends due the Commonwealth.

In all incorporated companies (banking companies excepted) now created, or which may hereafter be created by virtue of any law of this commonwealth, and in which any portion of the stock now is or hereafter shall be held by the state, and whereon dividends have been or hereafter may be declared by the directors or managers thereof, respectively, it shall be the duty of each and every of the treasurers of the said incorporations respectively, to pay the proportions due to the state into the treasury of this commonwealth, within sixty days after each declaration of dividends, and within sixty days after passage of this act with respect to dividends heretofore declared, and on failure to make such payment, the governor is hereby directed to instruct the attorney general to bring suit therefor against such defaulting company.[10]

(d) Power to purchase stock and securities of other companies.

Any corporation organized for profit, created by general or special laws, may purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by, any other corporation or corporations of this or any other State, and while the owner of said stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.[11]

DISSOLUTION.

(a) Voluntary.

It shall be lawful for any court of common pleas of the proper county to hear the petition of any corporation under

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[10] Act of March 19, 1816, 6 Sm. L. 390.

[11] Act of July 2, 1901, P. L. 603. The Act of March 31, 1868, Section 1, P. L. 50, permits the investment of the surplus funds of a corporation "in mortgages on improved real estate, in ground rents, in the loans of the United States, in purchase from the holders thereof any of the shares of the capital stock of the respective company, and also in the public debt of the State of Pennsylvania, or of the City of Philadelphia, or in other good stocks and securities."

the seal thereof, by and with the consent of a majority of a meeting of the corporators, duly convened, praying for permission to surrender any power contained in its charter, or for the dissolution of such corporation; and if such court shall be satisfied that the prayer of such petition may be granted without prejudice to the public welfare, or the interests of the corporators, the court may enter a decree in accordance with the prayer of the petition, whereupon such power shall cease or such corporation be dissolved: *Provided,* That the surrender of any such power shall not in anywise remove any limitation or restriction in such charter; and that the accounts of the managers, directors, or trustees of any dissolved company shall be settled in such court, and be approved thereby; and dividends of the effects shall be made among any corporators entitled thereto, as in the case of the accounts of assignees and trustees: *Provided further,* That no property devoted to religious, literary or charitable uses shall be diverted from the objects for which they were given or granted: *Provided,* That the decree of said court shall not go into effect until a certified copy thereof be filed and recorded in the office of the secretary of the commonwealth.[12]

(b) Involuntary.

Writs of quo warranto in the form and manner hereinafter provided, may also be issued by the several courts of common pleas, concurrently with the supreme court, in the following cases, to wit:

IV. In case any association, or number of persons, shall act as a corporation, or shall exercise any of the franchises or privileges of a corporation, within the respective county, without lawful authority.

V. In case any corporation as aforesaid, shall forfeit by

[12] Act of April 9, 1856, P. L. 293. The Supplemental Act of April 4, 1872, P. L. 40, provides that the "proper county" in which to make the application may be either the county in which the corporation's principal operations are carried on, or the county in which its principal office is located, but publication must be made in both counties.

misuser, or non-user, its corporate rights, privileges or franchises, or shall do, suffer, or omit to do, any act, matter or thing, whereby a forfeiture thereof shall by law be created, or shall exercise any power, privilege or franchise not granted or appertaining to such corporation.

And in any such case, the writ aforesaid may be issued upon the suggestion of the Attorney General, or his deputy, in the respective county, or of any person or persons desiring to prosecute the same.[13]

Whenever any corporation, incorporated under the laws of this commonwealth, shall have been dissolved by judgment of ouster, upon proceedings of *quo warranto* in any court of competent jurisdiction, all the estate, both real and personal, of which such corporation are in any way seized or possessed, shall pass to and vest in the persons who at the time of such dissolution are the officers of such corporation, in trust to hold the same for the benefit of the stockholders and creditors of the corporation.[14]

Whenever any corporation incorporated under the laws of this Commonwealth shall be dissolved by judgment of ouster upon proceedings by quo warranto in any court of competent jurisdiction, the said court, or in vacation any one of the law judges thereof, shall have power to appoint a receiver, who shall have all the powers of a receiver appointed by a court of chancery, to take possession of all the estate, both real and personal thereof, and make distribution of the assets among the persons entitled to receive the same according to law. The powers of such receiver may continue as long as the court deems necessary for said purposes and he shall be held to supersede an assignee of the corporation in possession.[15]

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[13] Act of June 14, 1836, Section 2, P. L. 623.

[14] Act of April 4, 1872, Section 1, P. L. 46.

[15] Act of April 26, 1893, Section 1, P. L. 26. It takes the place of Section 2 of the Act of April 4, 1872, P. L. 46, in which the right to appoint a receiver was confined to a member of the Supreme Court.

The Act of April 15, 1891, P. L. 15, provides for the sale of the real estate of a dissolved corporation, and the distribution of the proceeds of the sale.

SALE OF CORPORATE FRANCHISES AND PROPERTY.

Whenever the material, rolling stock, property and franchises of any gas, water, coal, iron, steel, lumber, oil, or mining or manufacturing, transportation or telegraph company, or any railroad, canal, turnpike, bridge or plank road, *or* of any corporation, created by or under any law of this State, shall be sold and conveyed, under and by virtue of any process or decree of any court of this State or of the circuit court of the United States, [or under or by virtue of a power of sale contained in any mortgage or deed of trust, without any process or decree of a court in the premises,] the person or persons for or on whose account such *material, rolling stock, property and franchises of any gas, water, coal, iron, steel, lumber, oil, or mining or manufacturing, transportation or telegraph company, or any* railroad, canal, turnpike, *bridge or* plank road, *or of any corporation, created by or under any law of this State,* may be purchased, shall be and they are hereby constituted a body politic and corporate, and shall be vested with all the right, title, interest, property, possession, claim and demand in law and equity, of, in and to such *material, rolling stock, property or franchises of any gas, water, coal, iron, steel, lumber, oil, or mining or manufacturing, transportation or telegraph company, or any* railroad, canal, turnpike, bridge or plank road, *or of any corporation, created by or under any law of this State,* with the appurtenances, and with all the rights, powers, immunities, privileges and franchises of the corporation, as whose the same may have been so sold, and which may have been granted to or conferred thereupon, by any act or acts of Assembly whatsoever, in force at the time of such sale and conveyance, and subject to all the restrictions imposed upon such corporation by any such act or acts, except so far as the same are modified hereby; and the person for or on whose account any such *material, rolling stock, property and franchises of any gas, water, iron, steel, lumber, oil, or mining or manufacturing, transportation or telegraph company, or any* railroad, canal, turnpike, bridge or plank

road, *or of any corporation, created by or under any law of this State,* may have been purchased, shall meet, within thirty days after the conveyance thereof shall be delivered, public notice of the time and place of such meeting having been given, at least once a week for two weeks, in at least one newspaper published in the city or county in which such sale may have been held, and organize said new corporation by electing a president and board of six directors, (to continue in office until the first Monday of May succeeding such meeting, when and annually thereafter on the said day a like election for a president and six directors shall be held to serve one year,) and shall adopt a corporate name and common seal, determine the amount of the capital stock thereof, *not exceeding the amount authorized in the original charter,* and shall have power and authority to make and issue certificates therefor to the purchaser or purchasers aforesaid, to the amount of their respective interests therein, in shares of fifty dollars each, and may then or at any time thereafter create and issue preferred stock to such an amount and on such terms as they may deem necessary, and from time to time to issue bonds, at a rate of interest not exceeding *six* per centum, to any amount not exceeding their capital stock, and to secure the same by one or more mortgages upon the real and personal property and corporate rights and franchises, or either, or any part or parts thereof: [*Provided,* That no coal, iron, steel, lumber, or oil, or mining, manufacturing, transportation or telegraph company, shall have the benefit of this act, unless it shall have previously filed, with the Secretary of State, its acceptance of all the provisions of the Constitution, as provided by law.][16]

The provisions of this act shall not inure to the benefit of any corporation unless such corporation shall, before

[16] Act of April 8, 1861, P. L. 259. The words printed in italics were added by the amendment of May 25, 1878, P. L. 145, and those in brackets by the amendment of May 31, 1887, P. L. 278.

Section 2 of the Act of April 8, 1861, P. L. 260, as re-enacted by the Act of May 25, 1878, Section 2, P. L. 146, provides that any corporation to take the benefit of the act must accept Article xvi of the Constitution of the State.

claiming or using the benefits of this act, file in the office of the secretary of the commonwealth, an acceptance of the provisions of article sixteen of the constitution of this commonwealth, which acceptance shall be made by resolution adopted at a regular or called meeting of the directors, trustees or other proper officers of such corporation, certified under the seal of the corporation; and a copy of which resolution, certified under the seal of the office of the secretary of the commonwealth, shall be evidence for all purposes.[17]

In all cases in which the property and franchises of any corporation, mentioned in the act [of April 8th, 1861, P. L. 259, and its supplement of May 25th, 1878, P. L. 148], or of any telegraph company, may have been or shall hereafter be purchased at any sale, by virtue of any process or decree of any court of this Commonwealth or the circuit court of the United States, *or under or by virtue of a power of sale contained in any mortgage, or deed of trust, without any process or decree of a court in the premises,* the person or persons, for or on whose account the same may have been or shall hereafter be purchased, shall have power and authority to determine the amount of the capital stock and bonds to be issued therefor, and to issue therefor certificates for the said capital stock, and also bonds, and secure the same by mortgage or mortgages on the real and personal property, corporate rights and franchises purchased. Such stock or bonds, or both, shall be issued to the purchaser or purchasers for their respective interests, in such amounts and proportions as may be determined by themselves, and shall be deemed and taken to have been issued for and in consideration of the property and franchises so purchased and received: *Provided, That no railroad, canal or other transportation company, or telegraph company, shall have the benefit of this act, unless it shall have previously filed, with the Secretary of State, its acceptance of all the provisions*

[17] Act of May 25, 1878, Section 3, P. L. 145.

of the Constitution of this State, in manner and form as provided by law.[18]

In all cases in which the property and franchises of any corporation mentioned in the act and its supplements, and to which this is a further supplement, or of any telegraph company, have been sold, by virtue of any [order] or decree of any court of this commonwealth or the circuit court of the United States, and the person or persons for or on whose account the same have been purchased, have organized a corporation under the provisions of said act, and have issued stock and bonds to the purchaser or purchasers for their respective interests, secured by mortgage, in such amount and proportions as may have been determined and agreed upon by them, such issues are hereby ratified, approved and confirmed.[19]

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[18] Act of May 25, 1878, Section 1, P. L. 148. The words printed in italics were added by the amendment of May 31, 1887, P. L. 276.

[19] Act of May 25, 1878, Section 2, P. L. 148, Section 3, provides that any corporation to take the benefit of the act must accept Article xvi of the Constitution of the State.

LEGISLATION SPECIALLY PERTAINING TO IMPORTANT KINDS OF CORPORATIONS.

RAILROADS.

Act of February 19th, 1849, P. L. 79, and supplements.

Act of April 4th, 1868, P. L. 62, and supplements.

Pepper & Lewis's Digest of Laws, edition of 1909, title, Railroads and Canals.

STREET RAILWAYS.

Act of March 22nd, 1887, P. L. 8. Pepper & Lewis's Digest of Laws, edition of 1909, title, Corporations, pars. 415, 419, 422 to 428.

Act of May 14th, 1889, P. L. 211. Pepper & Lewis's Digest of Laws, edition of 1909, title, Corporations, pars. 509, *et seq.*

Act of June 7th, 1901, P. L. 514. Pepper & Lewis's Digest of Laws, edition of 1909, title, Corporations, pars. 528, *et seq.*

GAS AND WATER COMPANIES.

Pepper & Lewis's Digest of Laws, title, Corporations, edition of 1909, pars. 242-291.

BANKS.

Act of April 16th, 1850, P. L. 477. Pepper & Lewis's Digest of Laws, edition of 1909, title, Banks and Banking, pars. 44, *et seq.*

BANKING CORPORATIONS.

Act of May 13th, 1876, P. L. 101. Pepper & Lewis's Digest of Laws, edition of 1909, title, Banking Companies, pars. 1, *et seq.*

BANKING DEPARTMENT.

Act of February 11th, 1895, P. L. 4. Pepper & Lewis's Digest of Laws, edition of 1909, title, Banks and Banking, pars. 1, *et seq.*

ELECTRIC LIGHT, HEAT AND POWER COMPANIES.

Pepper & Lewis's Digest of Laws, edition of 1909, title, Corporations, pars. 221-226.

INSURANCE COMPANIES.

Act of May 1st, 1876, P. L. 53. Pepper & Lewis's Digest of Laws, edition of 1909, title, Insurance, pars. 32, *et seq.*

MANUFACTURING CORPORATIONS.

Pepper & Lewis's Digest of Laws, edition of 1909, title, Corporations, pars. 309-329.

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